o. 92-780-CFX
tatus: GRANTED

ocketed:
ovember 2, 1992

Title: National Organization For Women, Inc., etc., et al., Petitioners
v.
Joseph Scheidler, et al.

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Clayton,Fay

Counsel for respondent: Brejcha,Thomas, Lohr,Ann-Louise, Harlib,Robert S., Klenk,Timothy C., Chemers,Robert Marc, Weber,Walter M., Parshall,Craig L., Linton,Paul B., Sekulow,Jay Alan

ntry	Date	Note	Proceedings and Orders
1	Nov 2 1992	G	Petition for writ of certiorari filed.
3	Nov 25 1992		Order extending time to file response to petition until December 23, 1992.
4	Nov 25 1992		This extension is granted for all respondents.
5	Dec 4 1992		Brief of respondent Vital-Med Laboratories, Inc. in opposition filed.
6	Dec 18 1992		Brief of respondents John P. Ryan and Pro-Life Direct Action League, Inc. in opposition filed.
8	Dec 21 1992		Brief of respondent Monica Migliarino (Miller) in opposition filed.
7	Dec 22 1992		Brief of respondents Randall A. Terry, et al. in opposition filed.
9	Dec 23 1992		Brief of respondents Joseph M. Scheidler, et al. in opposition filed.
10	Dec 29 1992		DISTRIBUTED. January 15, 1993
11	Jan 12 1993	X	Reply brief of petitioners filed.
12	Jan 19 1993	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
13	May 20 1993		Brief amicus curiae of United States filed.
14	May 26 1993		REDISTRIBUTED. June 11, 1993
15	Jun 4 1993	X	Supplemental brief of respondents Randall A. Terry, et al. filed.
16	Jun 14 1993		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
18	Jul 13 1993		Order extending time to file brief of petitioner on the merits until August 13, 1993.
19	Jul 27 1993	D	Motion of Legal Defense for Unborn Children for leave to file a brief as amicus curiae filed.
20	Jul 27 1993	D	Motion of Alan Ernest to allow counsel to represent children unborn and born alive filed.
21	Aug 13 1993		Brief amicus curiae of United States filed.
22	Aug 13 1993		Brief of petitioners NOW, Inc., et al. filed.
23	Aug 13 1993		Joint appendix filed.
24	Aug 13 1993		Brief amici curiae of New York, et al. filed.
25	Aug 13 1993		Brief amici curiae of National Abortion Federation, et al. filed.
26	Aug 13 1993		Brief amicus curiae of National Network of Abortion Funds

No. 92-780-CFX

Entry	Date	Note	Proceedings and Orders
			filed.
27	Aug 13 1993		Brief amici curiae of American Medical Association, et al. filed.
28	Aug 13 1993		Brief amici curiae of NOW Legal Defense and Education Fund, et al. filed.
32	Aug 16 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Seventh Circuit.
29	Aug 17 1993		Brief amicus curiae of American Civil Liberties Union filed.
31	Aug 17 1993	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
30	Aug 19 1993	D	Motion of respondent Monica Migliorino for divided argument and for additional time for oral argument filed.
34	Sep 2 1993		Order extending time to file brief of respondent on the merits until September 29, 1993.
35	Sep 24 1993		Motion of Legal Defense for Unborn Children for leave to file a brief as amicus curiae DENIED.
36	Sep 24 1993		Motion of Alan Ernest to allow counsel to represent children unborn and born alive DENIED.
37	Sep 24 1993		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
38	Sep 24 1993		Motion of respondent Monica Migliorino for divided argument and for additional time for oral argument DENIED.
39	Sep 29 1993		Brief of respondent Monica Migliarino (Miller) filed.
40	Sep 29 1993		Brief amici curiae of Ohio Right to Life, et al. filed.
41	Sep 29 1993		Brief of respondents Joseph M. Scheidler, et al. filed.
42	Sep 29 1993		Brief of respondent Timothy Murphy filed.
43	Sep 29 1993		Brief of respondents Randall A. Terry, et al. filed.
44	Sep 29 1993		LODGING consisting of nine copies of paperbound book entitled CLOSED: 99 Ways to Stop Abortion, received from counsel for the respondent.
45	Sep 29 1993		Brief amicus curiae of Focus on the Family filed.
46	Sep 29 1993		Brief amici curiae of People for the Ethical Treatment of Animals, Inc., et al. filed.
47	Sep 29 1993		Brief amici curiae of Southern Center for Law & Ethics, et al. filed.
48	Oct 12 1993		CIRCULATED.
49	Oct 14 1993		SET FOR ARGUMENT WEDNESDAY, DECEMBER 8, 1993.(1ST CASE).
50	Nov 1 1993	X	Reply brief of petitioners filed.
52	Dec 7 1993		Record filed.
		*	Original proceedings United States District Court for the Northern District of Illinois (3 BOXES).
51	Dec 8 1993		ARGUED.

No. (1)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

v.

JOSEPH SCHEIDLER, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Of Counsel:

LOWELL E. SACHNOFF, ESQ.
JACK L. BLOCK, ESQ.
JUDI A. LAMBLE, ESQ.
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000

ALAN M. POLLACK, ESQ.
POLLACK & GREENE
488 Madison Avenue
New York, New York 10022
(212) 688-5888

FAY CLAYTON, ESQ.
Counsel of Record
SUSAN VALENTINE, ESQ.
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

Counsel for the Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in addition to the statutory "interstate commerce" and injury to one's "business or property" requirements of RICO, RICO should be further limited to cases where either the enterprise or the predicate acts has an overriding economic motive?

2. Whether the Sherman Act contains an implied exemption for all organizations that claim to be espousing a "social cause" when those organizations combine to force lawful businesses from the marketplace, when those organizations are not engaging in protected speech or petitioning, and when no constitutionally-compelled exception to the Sherman Act applies?

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

In addition to the respondent listed in the caption, respondents include John Patrick Ryan; Randall A. Terry; Andrew Scholberg; Conrad Wojnar; Timothy Murphy; Monica Migliorino; Vital-Med Laboratories, Inc.; Pro-Life Action League, Inc.; Pro-Life Direct Action League, Inc.; Project Life; and Operation Rescue.

The parent company of petitioners Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., is Women's Health Organization, Inc. The National Organization for Women, Inc., has no parent or subsidiary companies.

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IN THE

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OCTOBER TERM, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

v.

JOSEPH SCHEIDLER, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The National Organization for Women, Inc., and the plaintiff clinics respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 968 F.2d 612 (7th Cir. 1992), and is reproduced as Appendix A to this Petition. The opinion of the District Court for the Northern District of Illinois, dismissing this lawsuit, is reported at 765 F.Supp.

937 (N.D. Ill. 1991), and is reproduced as Appendix B. The earlier decisions of the District Court, R.42, R.55, R.268, and R.320, holding that the claim for antitrust violations stated a claim, are reproduced as Appendices C, D, E, and F.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals (App. A) was entered on June 29, 1992. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on August 4, 1992 (App. G). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801; Nov. 16, 1990, Pub.L. 101-588, § 4(a), 104 Stat. 2880.)

18 U.S.C. § 1962(c)

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct

of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(d)

It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1964(c)

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

This civil class action was brought by a group of commercial women's health clinics and a national organization dedicated to protecting women's reproductive rights. The plaintiffs seek relief from a nationwide criminal conspiracy of extremists who use unlawful and violent methods to close clinics that perform abortions and to prevent women from using the services of those clinics. Because the conspiracy was carried out through predicate acts of extortion,[1] relief was sought under the Racketeer Influenced

[1] A 107-page RICO case statement, R.469, detailed hundreds of the predicate unlawful acts on which the claim was based. These include at least 23 acts of arson and attempted arson; 33 fire bombings; 11 acts of destruction of clinic property; 8 assaults and batteries upon clinic staff and personnel; 73 clinic invasions; 311 physical blockades; 383 acts of trespass on private property; 84 acts of harassment; 25 burglaries and thefts; 7 tortious acts of interference with clinics' leases and other contractual relationships; and the theft of 4,000 fetuses from a pathology laboratory used by many of the clinics, coupled with the threat to publicly disclose the names of the women who conceived the fetuses. The Seventh Circuit described defendants' conduct as "reprehensible." App. A-17.

and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962 *et seq.* Because the conspiracy was designed to—and did—unreasonably interfere with the ability of the women's health clinics to compete in the market for pregnancy-related services, reduced supply in many geographic markets and threatened to do so in others, and because it had succeeded in raising prices to consumers without any countervailing pro-competitive effects, relief was also sought under the Sherman Act, 15 U.S.C. § 1.

Among the defendant conspirators are an anti-choice clinic (Project Life) and several individuals who operate clinics that compete with the plaintiff clinics to provide pregnancy-related services, such as pregnancy testing and counselling.[2] This case is not about a woman's right to abortion; it is about RICO and antitrust.

The complaint did not in any way implicate lawful speech or petitioning by persons opposed to abortions. It attacked only the independently illegal and tortious conduct of the extremists, which the Court of Appeals characterized as "otherwise-criminal." App. A-3 n.4, A-19. While the predicate acts of the co-conspirators sometimes led to their arrest and conviction, a central goal of the conspiracy was to overwhelm local law enforcement resources and render them ineffective. Therefore, the defendants' conduct continued largely undeterred.

Although the District Court's opinion was based primarily on its supposition that the defendants' campaign of terrorism was protected as "petitioning" by the First Amendment, *see* App. B, the Court of Appeals immediately rejected that reasoning because the defendants' objective was not to influence legislation but to destroy the clinics'

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[2] Defendants Wojnar, Scholberg and Terry participate in the operation of such clinics.

business and force them to close. App. A-4.[3] Thus, the *Noerr-Pennington* doctrine could not shield their conduct from antitrust scrutiny, App. A-6, nor could there be any constitutional impediment to relief under RICO. In fact, the Court of Appeals chided the defendants for their "audacity" in suggesting that their campaign of criminal acts was protected as a form of speech. App. A-15.

The defendants include more than just hooligans: several of them own and operate pregnancy-testing and counseling facilities that compete with the plaintiff clinics,[4] and many derive substantial income—in some cases hundreds of thousands of dollars a year—from their enterprises. The lower courts agreed that the conspirators' goal was to lessen competition, App. D-3, and to take away the plaintiff clinics' business and force them to close. App. A-4.

Although most of the co-conspirators were recruited from low-paying jobs, the enterprises that they formed to carry out their goals rapidly became major profit-making businesses that substantially increased the incomes of the defendants and their fellow co-conspirators. R.469 at 17 n.5, 18; Complaint ¶¶ 100-104. Former used-car salesman Randall Terry's 1989 income from the enterprise was over $770,000. R.469 at 18.

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[3] The defendants admitted that their goal was to close clinics and publicly announced that criminal acts were necessary because "pro-life activists cannot wait for the legislative and judicial processes that will make abortion illegal." They vowed to use "any and all means available" to close these health centers. They said that "no clinic will be spared." Complaint (R.236) ¶ 53.

[4] One defendant, Conrad Wojnar, runs a chain of at least five such "women's centers" in the Chicago Area. App. D-2. Project Life, a competing clinic, is run by Randall Terry. Complaint ¶¶ 20, 36.

Despite the fact that the businesses that the conspirators targeted—and, in some cases, closed—are commercial establishments heavily engaged in interstate commerce, and despite the fact that the defendants and their competing, anti-choice clinics amassed hundreds of thousands of dollars from the enterprises they established to eliminate these lawful businesses from the market, the Circuit Court found a lack of "economic motive" in either the enterprise or the predicate acts, and concluded, contrary to Third Circuit precedent, that economic motive is an implicit requirement of RICO. This holding squarely conflicts with *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, *cert. denied*, 493 U.S. 901 (1989). Furthermore, because the Seventh Circuit disregarded the objective economic aspects of the defendants' misconduct and required a subjective "economic motive," it deviated severely from the objective "economic dimension" that the Second and Eighth Circuits have looked for in a RICO claim. As for the Sherman Act, the Circuit Court held that even though the defendants had demonstrated their intent and ability to injure consumers by raising costs and reducing the supply of a lawful service, the Sherman Act exempts even criminal organizations if they claim to espouse a "social cause." Such an implied exemption is unprecedented in antitrust decisions of this Court, and directly conflicts with the Eighth Circuit's decision in *Council of Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920).

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S OPINION, REQUIRING AN ECONOMIC MOTIVE UNDER RICO, CONFLICTS DIRECTLY WITH THE THIRD CIRCUIT AND IS INCONSISTENT WITH OPINIONS OF THE SECOND AND EIGHTH CIRCUITS

The Seventh Circuit's opinion, holding that there is an implicit economic motive requirement in RICO, is in direct conflict with the Third Circuit's decision in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989), as the Seventh Circuit conceded, App. A-26. It also deviates substantially from the holdings of the Second Circuit in *United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985), and *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983); and with the Eighth Circuit's in *United States v. Clark*, 646 F.2d 1259 (8th Cir. 1981), and *United States v. Ellison*, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986), by transforming the requirement that either the predicate acts or the enterprise have some objective "economic dimension" into a requirement that amounts to an overriding and subjective economic motive.

McMonagle was a case both factually and legally similar to this case, although the criminal acts there were directed against a single clinic. The Third Circuit refused to require an economic motive under RICO.[5] It reasoned that the "lack of economic motive does not constitute a defense to Hobbs Act crimes," and since the predicate acts there (as here) were extortion, no economic motive

[5] *See also Feminist Women's Health Center v. Roberts*, No. C86-161, 1988 WL 156656, 11 n.2 (W.D. Wash., March 11, 1988) (refusing to impose an economic motive requirement).

was required. *Id.* at 1348-50, n.7. The Seventh Circuit agreed that the Hobbs Act does not require any economic motive, App. A-32, n.17, and yet it held that an economic motive requirement lurked somewhere in the predicate acts *or* enterprise elements of RICO.

For over a decade this Court has acknowledged the "self-consciously expansive language and overall approach" of RICO, and has stressed that RICO must be "liberally construed to effectuate its remedial purpose." *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985); *see also United States v. Turkette*, 452 U.S. 576, 586-87 (1981). The Court has said that "[t]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Sedima* at 499. Repeatedly, this Court has stricken decisions attempting to add new elements to RICO, *e.g.*, the "racketeering injury" requirement in *Sedima*; the "organized crime" requirement in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989); and the "illegitimate association" requirement in *United States v. Turkette*, 452 U.S. at 587. The opinion below acknowledged this Court's admonition "that courts should not graft on additional elements" to RICO, App. A-32; yet it did just that. Here, in the guise of "fleshing out" the definition of either enterprise or predicate acts (the opinion implies that an economic motive for either would suffice), the Seventh Circuit has created a loose, subjective new element for RICO.

Legislative history shows that Congress enacted RICO to remedy the economic *effects* of racketeering activities and the threat that those activities have on domestic security and welfare. Congress knew that racketeering activities have economic effects, regardless of whether they derive from profit-motivated ventures. The concern with economic *effects*—as opposed to motives—is manifested in the *existing* requirements that: (1) the enterprise's ac-

tivities affect interstate commerce, 18 U.S.C. §§ 1962(a) through (d); and (2) the aggrieved plaintiffs suffer injury in their "business or property," 18 U.S.C. § 1964(c).[6] These are the only economic requirements that are true to the text of RICO.

To the extent that an economic element has been read into RICO by the Second Circuit (upon which the Seventh Circuit heavily relied), the requirement is nothing more than "an *objective* appraisal that *some economic purpose* was to be accomplished by the crime charged." *Bagaric*, 706 F.2d at 55.[7] *Bagaric* explained that RICO does *not* demand an inquiry into subjective motives, and expressed discomfort with a "motive" requirement of any sort:

> We purposely highlight our use of the word "motivated." As the text makes clear, we are troubled by the notion, advanced by appellants, that the government will be required to prove the animating or long-run objective of a RICO enterprise was economic, apparently to the exclusion of other, collateral "motives." It is clear that § 1962 does not, by its terms, require proof of ultimate improper economic motive. . . .

Id. at 53. Thus, *Bagaric* "decline[d] to add an element of proof which would hamper the effective implementation of the [RICO] statute," 706 F.2d at 54, requiring only that the offense have some objective "economic dimension," 706 F.2d at 53 n.11. This requirement is both less onerous and more capable of objective determination than "motive."

In *Bagaric*, the Second Circuit found a non-profit Croatian nationalist group liable under RICO, despite the fact that the enterprise lacked an economic motive, because

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[6] The Seventh Circuit acknowledged that the interstate commerce element and economic impact on the plaintiffs' businesses are well pled here. App. A-25, A-34.

[7] Unless otherwise noted, emphasis in quoted materials has been supplied.

"investigation into motive would serve only to politicize, and otherwise inflame, RICO prosecution." *Id.* at 54-55. It pointed out that the defendants there had tried "to inject peripheral political and religious considerations into the trial," and acknowledged that evidence about motives "can only have served to patronize the jury and to add a distracting element of emotionalism to the proceedings." *Id.* Citing a Seventh Circuit opinion authored by Justice (then Judge) Stevens, it agreed that defendants' " 'professed unselfish motivation, rather than a justification, actually identifies a form of arrogance which organized society cannot tolerate.' " 706 F.2d at 54, *citing United States v. Cullen*, 454 F.2d 386, 392 (7th Cir. 1971). With words that would be equally applicable to this case, the Second Circuit warned that an economic motive requirement "would authorize the admission of evidence of political beliefs, racial animosities, and family and blood feuds as justification for criminal acts." 706 F.2d at 55. Because the effect on the national economy is the same regardless of the defendant's motivation, the court stressed that RICO does *not* require proof of a paramount economic motive or "long-term pecuniary objectives." *Id.* at 54-55.

Shortly after *Bagaric*, in *Ferguson*, 758 F.2d at 843, the Second Circuit again steered clear of any subjective "motive" analysis and emphasized that its decision in *Bagaric* "does not stand for the proposition that there must be a *significant* economic purpose for RICO to apply." 758 F.2d at 853 (emphasis in the original). In fact, the court considered the "economic crimes" that the defendant Black Liberation Army had committed there sufficient objective evidence of a financial element to satisfy RICO.

The Seventh Circuit has created a requirement far more demanding—and subjective—than the Second Circuit imposed. Here, there was unquestionably a financial element in the defendants' misdeeds: Terry took in over $700,000

from the enterprise in a single year; Scheidler's Pro-Life Action League made over $100,000 on an annual basis.[8] Furthermore, the defendants ransacked commercial offices, interfered with leases and other commercial contracts, and committed other direct economic crimes against the clinics. Their very purpose was to drive competing clinics out of business and eliminate them from the national economy. This would be more than sufficient under *Bagaric* and *Ferguson*. As the Second Circuit said, "Because we believe Congress, and the traditions of our criminal law, contemplate trials free of consideration of such issues, we reject appellants' argument that economic motive must surmount all others." 706 F.2d at 55.

The Seventh Circuit's decision also clashes with the Eighth Circuit's in *Clark*, 646 F.2d 1259, which found a RICO violation by a governmental agency that had no economic goal, and with *Ellison*, 793 F.2d 942, which affirmed the RICO convictions of a white Christian supremacist group that lacked an economic motive. (The defendants there committed religiously-motivated acts of arson that resulted in no financial benefits to the enterprise. *Id.* at 950.)

While the Second and Eighth Circuits appear to require that economics play *some* role in the RICO violation, this element is amply satisfied here. The complaint and RICO case statement show that the defendants made a large and profitable business from their conspiracy and wreaked economic injury on the clinics and their clients. This is

[8] The financial aspects of the defendants' enterprises also include extravagant "consulting fees," travel expenses, company cars, and other benefits for the defendants and their families. R.469 at 21-22. Their sources of income include the sale of books, video tapes and the presentation of work shops on how to break the law and get away with it. These organizations have salaried employees, telephones, bank accounts, letterhead stationery, receptionists, secretaries, accountants, and a host of consultants—all the accoutrements of commercial businesses.

the very type of harm condemned by RICO because it "seriously burden[s] interstate . . . commerce, threaten[s] the domestic security, and undermine[s] the general welfare of the Nation and its citizens." Statement of Findings and Purpose, Pub.L. 91-452, 84 Stat. 922 (1970), 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 1073. As the Second Circuit explained in *Bagaric*, a RICO enterprise need not be profit-motivated to affect the national economy:

> The situation reached by § 1962 may thus not always be one in which the enterprise "makes money" for its members. Yet, even absent a requirement that the enterprise be a profit-making one, the section implements the principal congressional purpose, . . . [S]ince non-profit corporations (as well as entirely illegitimate associations of individuals) compete within the economy for funds and services, it would have been counter-productive to exempt from the statute those invested in, acquired, or maintained through a pattern of racketeering activity.

Id. at 56 (citations omitted).

The Seventh Circuit seriously erred—and created a dangerous precedent—in imposing a subjective and onerous "motive" requirement. Its conclusion that "non-economic crimes committed in furtherance of non-economic motives are not within the ambit of RICO," App. A-32, flings the door wide open for defendants to evade RICO liability simply by claiming their misdeeds had no overarching economic motive. If the decision is allowed to stand, it will turn every RICO trial into a free-for-all where evidence about defendants' subjective motives overwhelms the fact-finding tribunal. RICO already requires an impact on the nation's economy and injury to the plaintiff's business or property. There is simply no need to inject new economic requirements into RICO's "enterprise" or "predicate acts" provisions, as the Seventh Circuit has done here. The

Seventh Circuit's opinion has created a direct conflict with the Third Circuit and a major inconsistency with Second and Eighth Circuit decisions.[9] A writ of certiorari should be issued to resolve this conflict.

II.

THE SEVENTH CIRCUIT HAS ALSO CREATED AN UNPRECEDENTED "MOTIVE" DEFENSE TO THE SHERMAN ACT

A. This Court and the Courts of Appeals Have Consistently Rejected "Good Motives" As a Defense to Antitrust Claims

The judicial creation of exemptions from the Sherman Act based on a court's subjective view of what is socially desirable has been condemned time and again by this Court. The Seventh Circuit's opinion is unprecedented in allowing private parties to obstruct competition if they can persuade the court that their true motivation has to do with a "social cause." In the landmark opinion, *United States v. Addyston Pipe*, 85 F. 271, 284 (6th Cir. 1898), *aff'd.*, 175 U.S. 211 (1899), Judge William Howard Taft explained that some misguided courts have assumed the power to determine "how much restraint of competition is in the public interest, and how much is not." He condemned such an undertaking as setting "sail on a sea of doubt." *Id.* Cognizant of the courts' proper role, Judge Taft warned that "[t]he manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem a strong reason against adopting it." *Id.*

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[9] In his dissent from the denial of *certiorari* in *McMonagle*, Justice White noted the apparent conflict between the Third Circuit's refusal to require any economic motive and the Second and Eighth Circuits' requirement of an economic "element." 493 U.S. 901 (1989). The Seventh Circuit's holding creates a square conflict with the Third Circuit's, at the very least.

This Court, too, has long refused to consider defendants' "good motives" as a defense to the Sherman Act.[10] In *Board of Trade v. United States*, 246 U.S. 231, 238 (1918), Justice Brandeis said that a defendant's purpose may be relevant, "not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." The Court has repeatedly announced that implied exemptions from § 1 are strongly disfavored.[11] In *N.C.A.A. v. Board of Regents*, 468 U.S. 85, 101 n.23 (1984), the Court declared that while "the N.C.A.A.'s motives must be accorded a respectful presumption of validity, *it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice.*" It held that non-profit organizations may be liable for restraining trade even if they sincerely believe that what they are doing is important to some worthy goal. In *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), this Court reaffirmed Judge Taft's hesitation to embark on this "sea of doubt,"

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[10] In *United States v. Joint-Traffic Ass'n.*, 171 U.S. 505 (1898), and *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290 (1897), the defendants offered plausible policy arguments about how their agreements were necessary to avoid ruinous competition in their industry. Yet this Court unequivocally declared that courts are not in the business of making the socio-political and economic judgments necessary to determine whether competition is appropriate for an industry.

[11] *United States v. Philadelphia National Bank*, 374 U.S. 321, 350 (1963) (the repeal of the Sherman Act by implication is strongly disfavored); *United States v. First City National Bank of Houston*, 386 U.S. 361, 368 (1967) ("immunity from antitrust laws 'is not lightly implied' ") (quoting *California v. Federal Power Commission*, 369 U.S. 482, 485 (1962)); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975) ("Congress intended to strike as broadly it could with § 1 of the Sherman Act"); *Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 399 (1978) (there is a presumption against implied exclusions).

stressing that the judicial role does not lend itself to the *ad hoc* balancing necessary to determine whether defendants should be able to restrict the provisions of lawful services to consumers in the marketplace. 435 U.S. at 696. The only valid consideration is whether the challenged conduct enhances or diminishes competition. Here, of course, there are absolutely no pro-competitive benefits from the defendants' conspiracy.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 786-88 (1975), too, rejected the "good motives" defense when it refused the bar association's request to exclude lawyers from antitrust regulation because they are a "learned profession" and have a "public-service aspect" to their work. The Court held that "the nature of a profession . . . does not provide sanctuary from the Sherman Act," and emphasized that, because the language of § 1 contains no exceptions, even meritorious services in the public interest are subject to antitrust regulation. *Id. See also F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 462 (1986) (rejecting dentists' "moral and ethical policy of quality dental care" argument as defense to restraint on trade).

Four years ago, this Court again pointed out the dangers of considering "social" motives in a Sherman Act case. Even though the defendants in *Allied Tube and Conduit Corp. v. Indian Head*, 486 U.S. 492 (1988), argued that their conduct was motivated by the public interest and "a genuine belief that plastic conduit was unsafe," 486 U.S. at 498, the Court warned that if "social" objectives conferred antitrust immunity, any company could claim immunity on the ground that it intended to dramatize the plight of its industry and spur government action. *Id.* at 503. Similarly, in *F.T.C. v. Superior Court Trial Lawyers' Ass'n.*, 493 U.S. 411 (1990) ("*D.C. Lawyers*"), this Court dismissed the defense that a boycott was justified by the "public interest in obtaining better representation for in-

digent defendants," *id.* at 419, a cause that the majority of the Court acknowledged was worthwhile. The Court again stressed that good motives can *never* be a defense to antitrust claims:

> [I]nsofar as respondents seek immunity from prosecutions *on the basis of their good intent*, their theory of defense "is merely another variety of an age-old argument." *See United States v. Cullen*, 454 F.2d 392 (7th Cir. 1971).

493 U.S. at 428 n.11.

The rejection of the "good motives" defense makes sense in a free market economy. As the Court explained in *N.C.A.A.*:

> Congress designed the Sherman Act as a "consumer welfare prescription," (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)). A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.

468 U.S. at 107. Here, the defendants' conspiracy has violated this well-settled principle by denying consumers the right to choose from a full range of lawful reproductive health services and by denying health care professionals and business owners the right to earn their living at clinics that provide those services.

In his antitrust treatise, *The Antitrust Paradox*, at 105 (1978), Professor Bork explained how our free market economy is based on the premise that consumers will define their own welfare. The antitrust laws are designed to let them do that, with providers of lawful services free to compete with others to provide consumers with the services they choose. When people conspire, by unprotected means, to drive businesses from the market and to deprive consumers of the unrestricted range of services, they interfere with the free market and the antitrust laws

are implicated. This is precisely what the defendants have done here.

The antitrust decisions of this Court, as well as of the courts of appeals, teach that parties who believe that a particular consumer good or service is undesirable may speak out peaceably or seek governmental regulation to curtail its use. Here, defendants claim that a free marketplace that provides a full range of reproductive services is socially undesirable. They contend that only *their* brand of pregnancy-related counselling and support services should be permitted and that clinics that also offer abortion should be banned. If this is their belief, they have two legitimate avenues of recourse: (1) lawful petitioning of the government to ban the service of which they disapprove; and (2) lawful speech designed to persuade consumers to choose their services instead of those of clinics that also offer abortion. The complaint here alleges in great detail that the defendants' conspiracy went far beyond these two lawful activities. The antitrust laws prohibit the defendants from engaging in conspiracies to restrain trade by forcing their competitors out of the marketplace and denying consumers free choice.

The Seventh Circuit's opinion, exempting from the Sherman Act any party who claims to be espousing some "social cause," directly conflicts with the long-standing opinion of the Eighth Circuit in *Council of Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920), as well as with 100 years of antitrust jurisprudence of this Court. Furthermore, if its decision is allowed to stand, it will introduce a new and hopelessly unmanageable element into both the discovery and the trial of cases that many courts regard as complex enough already.

Council of Defense involved the boycott of the Hearst newspapers to protest Hearst's pro-German stance during the war. The "declared and obvious purpose" of the boy-

cott "was to destroy [Hearst's] business." 267 F. at 411. Protected speech was not implicated, and the boycott, despite its purely political motivation, was found illegal under the antitrust laws. Plainly and simply, the Eighth Circuit held that sincere social or political motives are no defense to a § 1 claim. The Seventh Circuit's decision squarely conflicts with this holding.

The Seventh Circuit claimed to find support for its disagreement with *Council of Defense* in *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and in another Eighth Circuit decision, *Missouri v. NOW*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980). However its reasoning does not withstand scrutiny. *Claiborne* held that the *peaceful* aspects of a consumer boycott are protected under the First Amendment, but expressly pointed out that the defendants' *illegal* and *violent* acts are not. *Id.* at 933. Here, the Seventh Circuit advised that it was "audacious" to suggest that the defendants' criminal and tortious acts are entitled to any protection under the First Amendment. The complaint here simply does not trench on protected activities:

> [The *NOW v. Scheidler* complaint] does not attempt to bar all anti-abortion activities. Peaceful picketing, debate, meetings, prayers, and a host of other forms of peaceful protest, are protected by the First Amendment. The complaint seeks relief from criminal and tortious activities, such as trespass, clinic invasion, vandalism, extortion, and tortious interference with business relationships.

App. A-6. For these reasons, *Claiborne* offers no support for the exemption the Seventh Circuit created.

The Eighth Circuit's decision in *Missouri* (which cited *Council of Defense* approvingly, *see* 620 F.2d at 1304 n.4) also offers no support for the Seventh Circuit's exemption. *Missouri* found that the legislative history of the

Sherman Act did *not* support a "good motives" exemption:

> Unfortunately, an examination of the legislative history does not clearly indicate the answer to the question we have here—whether Congress wanted to protect "free and fair" competition from political or social activities that can have the same effect upon competition as the commercial activities of a trust against a business.

620 F.2d at 1305. Like *Claiborne*, *Missouri* held that the First Amendment protects the peaceful aspects of a consumer boycott aimed solely at persuading the legislature to ratify a constitutional amendment. This is a far cry from the Seventh Circuit's holding that criminal acts aimed at destroying competitors' businesses are immune from antitrust laws if the conspirators wrap themselves in some "social cause." In fact, *Missouri* expressly disavowed the rule that the Seventh Circuit tries to attribute to it. *Missouri* declared that its decision did *not* rest "upon the basis that the boycott was non-commercial or non-economic . . . [but was] based upon the right to use political activities to petition the government." 620 F.2d at 1315 n.16. Thus, the Seventh Circuit's far-reaching new exemption finds no support in *Missouri*, either.[12]

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[12] The Seventh Circuit also claimed to find support in *Marjorie Webster Junior College, Inc. v. Middle States Ass'n. of Colleges and Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970), which held that enforcement of a rule limiting accreditation to non-profit schools was only an "incidental restraint on trade" that was "not sufficient to warrant application of the antitrust laws." *Id.* at 654. The court there noted that the accreditation process was "an activity distinct from the sphere of commerce." *Id.* at 655. The same cannot be said of the business of the women's health centers in this case, because they are integrally involved in interstate commerce. The Seventh Circuit's only other authority, *Council for Employment and Economic Energy Use v. WHDH Corp.*, 580 F.2d 9 (1st Cir. 1978), *cert.*

(Footnote continued on following page)

Ironically, it is an earlier case from the Seventh Circuit, *Wilk v. American Medical Ass'n.*, 719 F.2d 207, 211 (7th Cir. 1983), *cert. denied*, 467 U.S. 1260 (1984), that illustrates just how unworkable a "social cause" exception to the Sherman Act would be. In *Wilk*, thinking that motives were a relevant inquiry, the trial court allowed testimony about the AMA's subjective "social motives." The AMA claimed its restraint of trade was motivated by concern for "patient care," and it was prepared to prove its "genuine belief" that "chiropractic is dangerous quackery." The AMA maintained that it was motivated only by a sincere concern for "public health, safety and welfare." *Id.* at 216. This evidence led to an extremely lengthy trial and nearly turned it into a circus. Reversing the lower court, the Seventh Circuit explained that "the upshot of all this was much of the trial, and virtually all of the parties' arguments to the jury, were a free-for-all," with the defendants trying to prove the "depth and sincerity" of their beliefs, while the plaintiffs questioned the single-mindedness of these motives. *Id.* at 216.

Wisely, on appeal the Seventh Circuit rejected the AMA's attempt to offer its good motives as a defense to the Sherman Act and stressed how unmanageable antitrust cases would become if courts allowed a "good motives" defense. Such a subjective standard also gives far too much discretion to the trial judge or jury to determine which motives are "good" and which are "sincere." Unfortunately, in this case, the Seventh Circuit forgot what it had stressed in *Wilk*. It also failed to heed its own rule that "the highly factual and subjective questions

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[12] *continued*

denied, 440 U.S. 945 (1979), is also readily distinguishable because it involved classic petitioning—a referendum and radio time to speak out about it. Thus, the restraint was protected under *Eastern Railroad Presidents Conference v. Noerr Motor Freight Co., Inc.*, 365 U.S. 127 (1961).

of intent and purpose should be resolved [only] after discovery and trial." App. A-7, *citing Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985).

Justice Rehnquist has frequently reminded lawyers of the need to avoid protracted litigation that delays justice and unnecessarily ties up the courts. A "good motives" exemption to the Sherman Act would force parties to engage in intrusive and burdensome discovery of the defendants' finances, beliefs, personal associations, and a host of other subjective matters. It would open a Pandora's box of discovery and turn trials into "free-for-alls," as in *Wilk*. The ramifications of the Seventh Circuit's decision are daunting. This Court should grant a writ of certiorari to prevent the spread of such litigation nightmares.

In sum, the Seventh Circuit's opinion directly conflicts with the Eighth Circuit's holding in *Council of Defense*, and would call for the implicit overruling of numerous decisions of this Court, including *D.C. Lawyers*, *Allied Tube*, *Goldfarb*, *Federation of Dentists*, *Professional Engineers*, and *N.C.A.A.*. If allowed to stand, it would start the courts on the slippery slope of evaluating motives and their sincerity. Evidence in antitrust cases would be wildly multiplied by defendants trying to prove their altruistic social, religious, moral, and political motives, while plaintiffs tried to show that the defendants were less than sincere. Two-week trials would stretch to ten weeks; worse, three-month discovery periods would become three years.

B. The Sherman Act is Concerned with Objective Effects on Commerce and Consumers, Not with Subjective Motives of the Defendants

The Circuit Court expressed some concern about whether the defendants were "involved in business," App. A-16,

and questioned whether they were "exercising market power" to harm the clinics' business. *Id.* at A-19. It apparently overlooked the well-pled fact that the conspirators included business competitors, such as Project Life, and the owner/operators who run clinics that directly compete with the plaintiff clinics to provide pregnancy-related services. The Circuit Court also incorrectly concluded that the defendants did not control supply.

In *Federation of Dentists*, 476 U.S. at 460-61, this Court explained that the ability to drive up prices and restrict output establish market power. It said:

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, *"proof of actual detrimental effects, such as reduction of output," can obviate the need for inquiry into market power*, which is but a "surrogate for detrimental effects."

476 U.S. at 460-61. *See also United States v. duPont*, 351 U.S. 377, 391 (1956) (market power is shown by the ability to restrict output or raise costs). In *N.C.A.A.*, 468 U.S. at 107, too, the Court stated that anti-competitive effects such as increased prices and restricted output, which are unresponsive to consumer preference, are inconsistent with the fundamental goal of antitrust law. Increased costs and restricted output establish market power.[13] Both of these factors are established in this case, as is their effect upon consumers. The complaint directly alleges the defendants' power in the market: they have driven clinics out of a number of markets and raised costs everywhere.[14]

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[13] Even the Seventh Circuit recognized that would-be monopolists who try to injure competitors by raising their rivals' costs are subject to the antitrust laws. App. A-19 n.13.

[14] The defendants' methods included direct threats and physical attacks on clinic personnel; making phony appointments to pre-

(Footnote continued on following page)

Complaint ¶¶ 86, 87. They target the low-cost providers of these services; where they are successful, the market is severely restricted, and only hospital abortions remain available, at two to five times the price. *Id.* ¶ 8. They have targeted every clinic nationwide, beginning in the most concentrated geographic markets. *Id.* ¶¶ 44-45, 85. They have shown their ability to assemble thousands willing to risk arrest and conviction to interfere with these businesses' operations. They have admitted publicly that their tactics had been successful in some geographic markets.[15] Their acknowledged goal is to lessen competition and eliminate the availability of this lawful consumer service. This is antitrust injury under *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

In a factually similar case, *Northeast Women's Center, Inc. v. McMonagle*, 624 F.Supp. 736 (E.D. Pa. 1985), the court held that even a single clinic could sue under the antitrust laws against a conspiracy to drive it out of business. *McMonagle* noted that "the essence of competition covered by the Act is that choices be preserved," 624 F.2d at 740. Citing *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1364 (5th Cir. 1980), it held that ". . . A practice is 'plainly anticompetitive' . . . under the Sherman Act . . . when it operates to deny the consumers the opportunity to choose among alternative offers without offering the possibility of any joint, efficiency-producing eco-

[14] *continued*
vent real consumers from getting appointments; tying up clinic phone lines; extorting clinics' suppliers, landlords; and interfering with other business contracts. *E.g.*, Complaint ¶¶ 2, 37, 77, 125.

[15] Furthermore, it is well established that a party need not wait until it is driven out of the market before seeking a remedy under the Sherman Act. *E.g., Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 112 n.8 (1986). Nonetheless, the elimination of all competing clinics in certain geographic markets was pled in the complaint.

nomic activities." 624 F.2d at 740. Here, as in *McMonagle*, there are absolutely no pro-competitive benefits that flow from the defendants' unlawful acts. The avowed purpose and effect are to eliminate consumer choice. This strikes the very core of the antitrust laws because "Congress designed the Sherman Act as a 'consumer welfare prescription.' " *Reiter*, 442 U.S. at 343. Because a conspiracy based on "good motives" can interfere with free trade and consumer interests just as surely as one based on selfish ones, the Sherman Act is concerned with *effects* on business and commerce, not with the conspirators' *motives*.

The circuit court for the District of Columbia in *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 (D.C. Cir. 1984), explained that in addition to economic self-interest, a conspiracy may very well be used "to advance a group's social and moral objectives unrelated to the business and economic interest." Nevertheless, "[w]hatever the group's intent (and no matter how genuinely held), a boycott, if successful, may nonetheless injure the victim of the boycott and often thereby injure competition." 735 F.2d at 1493. The same court in *Costello Publishing Co. v. Rotelle*, 670 F.2d 1035 (D.C. Cir. 1981), refused to find immunity for an agreement to limit competition in liturgical books when the defendants asserted a purely religious motivation. In an earlier case, the Seventh Circuit itself wrote, "it is effect or consequences which controls, not intent." *Wilk*, 719 F.2d at 225.

Here the complaint alleges concerted unlawful intimidation and extortion designed to prevent health care professionals and their clients from participating in a free marketplace for reproductive services. Antitrust law requires that such conduct must be condemned, regardless of the defendants' intent. The underlying principle of all the relevant case law is that anti-competitive *effect*, not motive, is the key to antitrust liability. Here, the anti-

competitive effect is undisputed. There is simply no principled basis on which to distinguish socially-motivated conspiracies that restrain trade from those that are not so motivated. Allowing defendants to justify their anti-competitive conduct by asserting social or political rationalizations will unduly lengthen and complicate antitrust litigation and make it easier for wrongdoers to interfere with the free enterprise system to the detriment of consumers. Absent constitutional considerations, broadening of an antitrust exemption for "socially-motivated" activities is wholly unwarranted.

C. The Seventh Circuit Erred Profoundly in Both Its Reliance Upon and Its Reading of Legislative History

In *West Virginia University Hospitals v. Casey*, ___ U.S. ___, 111 S.Ct. 1138, 1147 (1991), Justice Scalia said that courts must interpret the *text* of a statute, not some elusive legislative intent. "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear we are not free to replace it with an unenacted legislative intent." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring). Despite this admonition, and recognizing the dangers of searching for a "legislative intent" (this should be particularly true of a statute that has been on the books for a century), the Seventh Circuit looked to the legislative history of the proposed "temperance" amendments to the Sherman Act, *which were never enacted*, to support its unprecedented holding that violent activities, if undertaken in the name of a "social cause," are free from antitrust scrutiny.

Only by several leaps of logic did the Seventh Circuit reach its conclusion. It reasoned as follows: first, some temperance crusaders engaged in violence. Second, Congress was "undoubtedly" aware of this violence since it

was reported in the press at the time. Third, some senators argued for limitations on the Sherman Act to exclude lawful speech of the *peaceful* temperance crusaders and to exclude the efforts of temperance crusaders to *persuade the government* to pass temperance laws.[16] Therefore, according to the Seventh Circuit's reasoning, even though those amendments to the Sherman Act were never enacted, Congress must have meant to exclude from the Sherman Act's coverage all violent acts, not only of temperance crusaders, but also of every other group that claims to be espousing a social cause.

There are fundamental difficulties with this logic. First, the fact that the violent acts of some extremist temperance crusaders may have made the history books does not establish that Congress knew about it. Second, the fact that some violence occurred does not prove that Congress cared to shield violent acts from federal regulation. Even though some senators wanted to protect peaceful acts of the temperance crusaders, it does not follow that they wanted to protect violent conduct as well. Third, the amendments were never passed. The Sherman Act was never amended to exempt people who crusaded for temperance (and it was certainly never amended to exempt those who crusaded violently). The debate in Congress over whether it would violate the Sherman Act if citizens

[16] The senators proposing the amendments apparently believed that even the peaceable temperance crusaders may have been subject to liability under the Sherman Act. Even putting aside the *Noerr* and First Amendment limitations, however, it is questionable whether the temperance crusaders' local consumer boycotts would have been considered part of "commerce" at the time of the debates. Indeed, the prevailing definition of "commerce" was so narrow that in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), the Court held that "manufacturing" was not encompassed by the term "commerce" in the Sherman Act; it was not until *Mandeville Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), that this narrow view was finally rejected.

agreed not to drink liquor, tried to persuade others not to drink liquor and tried to pass prohibition legislation foreshadowed the recognition by the courts of certain *constitutional* limits to Congress's power in § 1—primarily those imposed by the First Amendment.[17] Thus, the excerpts of legislative history that the Seventh Circuit cites, expressing concern for "belonging to or joining a temperance organization," and "making an agreement . . . between citizens . . . not to drink . . . and to persuade others in a similar abstention," App. A-9, are exercises of free speech and association that are protected by the First Amendment. There is not a speck of legislative history to support the Seventh Circuit's conclusion that violent and unlawful acts of the temperance crusaders or anyone else were intended to be exempt from the Sherman Act. All the examples given by Senator George and other Sherman Act opponents involved *lawful* speech, association and petitioning for the passage and enforcement of laws.

The Seventh Circuit expressed some concern that if this conspiracy were subject to the Sherman Act, so would the conspiracies of groups like Earth First! *See* App. A-17. If Earth First! unreasonably restrained trade and a logging company sued to enjoin it, we see no principled reason why Earth First! should be exempted either, unless Congress makes the decision to exempt it. A similar argument was made in *Patrick v. Burget*, 486 U.S. 94 (1988), where this Court refused to exempt a hospital peer re-

[17] The debaters' concern for organizations formed "for the purpose of laws being passed," App. A-10, is exemplified by the *Noerr-Pennington* cases, which, as the Seventh Circuit correctly explained, limit regulation of legitimate petitioning activity. The concerns were also exemplified by *Claiborne*, which makes clear that, unlike violent and unlawful activity, *peaceful* speech is protected from Sherman Act regulation by the First Amendment.

view committee from § 1 because Congress had not seen fit to exempt it.[18] It said, "[I]f physicians believe that the Act provides insufficient immunity to protect the peer review process fully, they must take that matter up with Congress." 486 U.S. at 105 n.8. The same should apply to Earth First!, Operation Rescue extremists and every other group that offers a "social" reason as its only excuse for engaging in an unreasonable restraint of trade.

Even though the judges in the court below indicated their personal disdain for the defendants' conduct, their opinion makes clear that they felt that they should not apply the Sherman Act to this case. As this Court's opinion in *Patrick* teaches, that decision is not for courts to make but for Congress. The Seventh Circuit's rationale for its new Sherman Act exemption is an egregious example of misusing historically unreliable materials to reach a preordained result.

If left uncorrected, the Seventh Circuit's opinion, which rests on rocky legislative-history footing, will set disastrous precedent and will call into question every decision of this Court and of the courts of appeals that has addressed the question whether the offer of "good motives" can immunize anti-competitive conduct. A writ of certiorari must issue to resolve the conflict in the circuits, to correct the conflict with precedent of this Court, and to prevent the introduction of an element that would make antitrust trials even more unwieldy than they already are.

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[18] In fact, Congress did pass a limited exemption for peer review committees that protects them from private antitrust actions under a well-specified set of circumstances. *See* 42 U.S.C. §§ 11111(a)(1) and 11112(a) (1986).

CONCLUSION

For all the reasons stated above, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Of Counsel:

LOWELL E. SACHNOFF, ESQ.
JACK L. BLOCK, ESQ.
JUDI A. LAMBLE, ESQ.
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000

ALAN M. POLLACK, ESQ.
POLLACK & GREENE
488 Madison Avenue
New York, New York 10022
(212) 688-5888

FAY CLAYTON, ESQ.
Counsel of Record
SUSAN VALENTINE, ESQ.
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

Counsel for the Petitioners

APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-2468

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions, DELAWARE WOMEN'S HEALTH ORGANIZATION, INCORPORATED and SUMMIT WOMEN'S HEALTH ORGANIZATION, INCORPORATED, on behalf of themselves and all other similarly situated clinics,

Plaintiffs-Appellants,

v.

JOSEPH M. SCHEIDLER, JOHN P. RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE ACTION LEAGUE, INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE, and OPERATION RESCUE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 7888—**James F. Holderman**, *Judge.*

ARGUED FEBRUARY 19, 1992—DECIDED JUNE 29, 1992

Before BAUER, *Chief Judge*, CUMMINGS, *Circuit Judge*, and VAN SICKLE, *Senior District Judge*.[1]

BAUER, *Chief Judge*. The plaintiffs, the National Organization for Women, Inc. ("NOW"), the Delaware Women's Health Organization, Inc. ("DWHO"), and Summit Women's Health Organization, Inc. ("SWHO"), brought this action seeking federal relief from the defendants' nationwide campaign to close medical clinics that provide abortion services. The second amended complaint[2] alleges violations of the Sherman Antitrust Act, 15 U.S.C. § 1, and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962(a), (c), and (d) ("RICO"). The complaint also raises several pendent state claims. The district court granted the defendants' motion to dismiss the complaint under F.R.C.P. 12(b)(6). *National Organization for Women v. Scheidler*, 765 F. Supp. 937, 945 (N.D. Ill. 1991).

The plaintiffs appealed. We reluctantly affirm the dismissal of the plaintiffs' claims for two reasons. First, we find that the antitrust laws were not intended to apply to the defendants' activities. Second, we hold that RICO requires either an economically motivated enterprise or economically motivated predicate acts.

I. Factual Background

The plaintiffs (a national non-profit organization aimed at advancing and protecting women's rights, and two women's health centers[3]), claim that the defendants, anti-abortion

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[1] The Honorable Bruce M. Van Sickle, Senior Judge of the United States District Court for the District of North Dakota, is sitting by designation.

[2] For purposes of simplicity, we shall refer to the second amended complaint (Record Document 236) in text as "the complaint."

[3] NOW sought class certification for itself, its women members who use or may use the targeted health centers, and other women who use or may use the services of such centers. The health-center plaintiffs sued on behalf of themselves and all other similarly-situated centers performing abortions. The district court did not

(Footnote continued on following page)

activists, anti-abortion groups, and a medical testing laboratory, engaged in a conspiracy to close all women's health centers providing abortions through a pattern of illegal activity. The complaint alleged that the defendants (other than Vital-Med Laboratories) engaged in the following illegal[4] activities in order to close women's health centers that perform abortions: extortion; physical and verbal intimidation and threats directed at health center personnel and patients; trespass upon and damage to center property; blockades of centers; destruction of center advertising; telephone campaigns designed to tie up center phone lines; false appointments to prevent legitimate patients from making them; and direct interference with centers' business relationships with landlords, patients, personnel, and medical laboratories.[5] Many of these activities were organized by a coalition of anti-abortion groups called the Pro-Life Action Network ("PLAN"). The defendants who have participated in PLAN activities, the "PLAN defendants" are Scheidler, Ryan, Terry, Scholberg, Murphy, Wojnar, Migliorino, Pro-Life Action League ("PLAL"), Pro-Life Direct Action League ("PDAL"), Operation Rescue ("OR"), and Project Life.

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[3] *continued*
certify either class, apparently deferring its ruling until resolution of the motions to dismiss. *See* Minute Order of 1/08/88. All pending motions were dismissed as moot when the court granted defendants' motion to dismiss. *See National Organization for Women v. Scheidler*, 765 F. Supp. 937, 945 (N.D. Ill. 1991).

[4] When we use the terms illegal and unlawful to describe the defendants' activities, we refer not to violations of RICO or the antitrust laws, but to acts that are otherwise unlawful, such as trespass and vandalism.

[5] The district court also found that the defendants, in particular Scheidler, have links with arsonists who have fire-bombed health centers. The court also found that the defendants have not condemned fire-bombing. The court made these findings after defendant Wojnar moved for Rule 11 sanctions based upon the plaintiffs' allegation of the association in a pleading. *See Denial of Defendant Wojnar's First Motion for Sanctions*, March 27, 1992.

More specifically, the complaint alleges that defendant Scheidler distributes Closed: *99 Ways to Stop Abortion*, a manual which advocates unlawful methods of interfering with the operations of women's health centers. Employing the methods detailed in the manual, defendants Scheidler, Ryan, Terry, Scholberg, Murphy, and Migliorino have spearheaded actions throughout the country aimed at closing health centers. For example, in March 1986, Scheidler, Ryan, PLAL, and PDAL, led others (alleged to be their co-conspirators) in an invasion of a health center in Florida. Protestors entered the center, and injured the center's administrator and another woman, the medical procedures room was ransacked, and medical supplies were destroyed. The participants who stormed the center were convicted on criminal charges.

Other demonstrations organized by defendants involved hundreds of individuals who blockaded clinics. During these "blitzes," as they are called, defendants' groups, using a method called "lock and block," pour glue into clinic locks, and individual protestors lock themselves to clinic doors. Another tactic involves abrasive confrontations with women seeking abortions, designed, according to a news release prepared by defendants, to take away the centers' business. The complaint details many other invasions of clinics, and in one case, a judge's home, involving injuries, trespass, and vandalism. Often these demonstrations resulted in the arrests of hundreds of demonstrators, including defendants, for state criminal law violations. For example, defendant Ryan has been arrested more than three hundred times; defendant Scheidler has been convicted and fined for criminal trespass and harassment. We note that the complaint does not purport to catalog all of the defendants' arrests and criminal convictions.

The plaintiffs also allege that two of the defendants (Wojnar and Terry) have established competing pregnancy testing and counseling facilities.

Defendant Vital-Med Laboratories, an Illinois corporation, provided pathology testing and safe, sanitary disposal

services to DWHO, SWHO, and other affiliated clinics. Plaintiffs allege that Vital-Med participated in a conspiracy to steal fetal remains from Vital-Med's Northbrook, Illinois laboratory. In January 1988, defendant Wojnar was contacted by a Vital-Med employee who detailed a scheme for stealing fetal remains from the laboratory. Over a ten-month period, in conspiracy with one or more Vital-Med employees, defendants Murphy and Migliorino stole approximately 4,000 aborted fetuses from the laboratory. Murphy and Migliorino each entered Vital-Med's Northbrook laboratory, opened sealed storage drums containing a variety of medical waste, and removed fetal specimens. On at least one occasion, an entire storage drum was stolen. Vital-Med employees, who saw Murphy and Migliorino on at least one occasion, did nothing to stop the thefts.

The remains were stored at the homes of Scheidler, Murphy, Migliorino, and Wojnar. Scheidler kept the storage drum in a playhouse in his backyard for several weeks. After the fetal remains were removed, Murphy dumped the drum containing the remaining medical waste in a dumpster in Chicago. Remains were sent to anti-abortion activists in Indiana, North Carolina, North Dakota, Delaware, and Florida. Activists eventually held mass burial services for the fetuses in several states. Scheidler announced to news media that the fetuses had been found at a Chicago laboratory and that they were "individually packaged and labelled . . . with the names of the mothers, doctors, dates and places the abortions were performed." Second Amended Complaint, R. 236 at 24. Vital-Med no longer accepts fetal remains for testing.

Finally, defendants contacted businesses that provide goods and services to health centers and threatened to disrupt and harass them if they continued to transact business with the centers. When SWHO arranged a move to new premises, defendant Migliorino threatened SWHO's future landlord and co-tenants. The landlord terminated the lease.

We note here that the complaint does not attempt to bar all anti-abortion activities. Peaceful picketing, debate, meetings, prayers, and a host of other forms of peaceful protest, are protected by the First Amendment. The complaint seeks relief from criminal and tortious activities such as trespass, clinic invasion, vandalism, extortion, and tortious interference with business relationships.

Moreover, the complaint does not allege that the defendants have attempted to influence any governmental actor. There is no allegation that defendants petitioned a court, an administrative agency, an executive officer, or a legislature. Therefore, the district court's conclusion that the defendants' primary objective was to influence legislation is in error. Although the defendants' acts generated publicity which they may have hoped would influence governmental actors, this tangential contact is not sufficient to invoke First Amendment protection for otherwise criminal behavior. *See NAACP v. Claiborne Hardware, Inc.*, 458 U.S. 886, 916 (1981).

II. Standard of Review

We review a 12(b)(6) dismissal *de novo*. *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1326 (7th Cir. 1990); *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984). An action may only be dismissed if the complaining party "can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). We assume all well-pleaded allegations are true and draw all reasonable inferences in the light most favorable to the plaintiff. *Summit Health, Ltd. v. Pinhas*, 111 S. Ct. 1842, 1845 (1991); *Bethlehem Steel*, 918 F.2d at 1326.

III. Antitrust Claims

The Supreme Court has cautioned that summary procedures should be used sparingly in antitrust cases because of the complexities involved. *Poller v. Columbia Broad-*

casting System, Inc., 368 U.S. 464, 473 (1962). Nevertheless, we have noted that "despite its sweeping language, *Poller* and its progeny simply stand for the proposition that, if a claim under the antitrust laws has been adequately set forth in the complaint, the highly factual and subjective questions of intent and purpose should be resolved after discovery and trial." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (citing *Havoco of America, Inc. v. Shell Oil Co.*, 626 F.2d 549, 559 (7th Cir. 1980), *cert. denied*, 470 U.S. 1054 (1985)). We also note that the treatment of this case has not been precipitous. It was filed on October 17, 1986. After discovery and two amendments to the complaint, the district court dismissed the action May 28, 1991.

Although Congress "left no area of its constitutional power [over commerce] unoccupied," when it passed the Sherman Act, it did not intend to outlaw every contract, combination, or conspiracy that restrains trade. *Summit*, 111 S. Ct. at 1846 n.10 (quoting *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945)). Otherwise every commercial business contract would fall within its prohibition. *See Standard Oil Co. v. United States*, 221 U.S. 1, 59-69 (1911) (despite broad wording, not every form of combination or conspiracy that restrains trade falls within Sherman Act); *Marjorie Webster Jr. College v. Middle States Association of Colleges and Secondary Schools*, 432 F.2d 650, 653 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-88 (1978). *But see Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1974) (language of § 1 "contains no exception. . . . [O]ur cases have repeatedly established that there is a heavy presumption against implicit exemptions.").

We generally are reluctant to delve into questions of legislative intent when applying statutes. *See West Virginia University Hospitals v. Casey*, 111 S. Ct. 1138, 1147-48 (1991). The Supreme Court, however, has expressly sanctioned inquiry into the legislative history of the antitrust laws. *See Brunswick Corp. v. Pueblo Bowl-O-Mat,*

Inc., 429 U.S. 477, 488 (1976) (examining legislative purpose and history of Clayton Act); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1939) (interpreting Sherman Act in light of legislative history and "particular evils at which the legislation was aimed.").

The Court explained in *Apex Hosiery*, 310 U.S. at 493 n.15, that "[t]he history of the Sherman Act as contained in the legislative proceedings is emphatic in its support for the conclusion that 'business competition' was the problem considered and that the act was designed to prevent restraints of trade which had a significant effect on such competition." For this reason, we question the appropriateness of the Act's application in this case.

We believe the Eighth Circuit's analysis of the legislative history of the Sherman Act in *State of Missouri v. National Organization for Women*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980) ("*Missouri v. NOW*"), is particularly helpful. In *Missouri v. NOW*, the National Organization for Women helped organize a convention boycott of all states that had failed to ratify the Equal Rights Amendment. The explicit purpose of the boycott was to put economic pressure on states to ratify the ERA. Missouri sued, arguing that the boycott constituted a restraint of trade in violation of the Sherman Act.[6]

The *Missiouri v. NOW* court noted that the legislative debates preceding passage of the Sherman Act indicate that the Act was not intended to reach the activities of

[6] We note that the boycott in *Missouri v. NOW* is readily distinguishable from the defendants' actions in this case. The boycott was a peaceful, otherwise lawful attempt to influence legislation. In this case defendants' conduct (trespass, extortion, vandalism, and theft) violates state criminal laws. "The First Amendment does not protect violence. 'Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of advocacy.'" *NAACP v. Claiborne Hardware, Inc.*, 458 U.S. 886, 916 (1981) (quoting *Samuels v. Mackell*, 401 U.S. 66, 75 (1970) (Douglas, J., concurring)). Moreover, the avowed purpose of the defendants' activities is to close centers, not influence government actors.

organizations espousing social causes. Specifically, the debates indicated a desire to avoid regulating organizations aimed at discouraging the consumption of alcohol. *See id.* at 1307-08. Indeed, during the debates over the Sherman Act, senators expressed concern about the breadth of the bill, and Senator Sherman sought to allay these fears:

> George:[7] But yet that is the legal meaning and force of the bill; and I will state to the Senate and to the Senator from Ohio [Sherman] that it is directly within the terms of this bill to forbid any number of persons belonging to or joining a temperance society whose object is to compel retailers of intoxicating liquors to give up their business.
>
> Sherman: Where men agree that they will not drink at all, does the Senator think that is a combination in restraint of the trade of liquor-sellers?
>
> George: What is it?
>
> Sherman: The Senator, as I understand, now claims that an agreement among several people not to drink whisky or brandy is in restraint of the trade of selling whisky or brandy and is therefore a combination within the meaning of this bill?
>
> George: I insist that a society, making an agreement or a combination between citizens of a town anywhere in the Union not to drink, not to use in any way vinous or spirituous liquors, and to persuade others to a similar abstention, does, in the language of this bill, tend to compel persons

[7] Senator James Z. George (D. Miss.). *See* 1 Earl W. Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes 15 (1978).

engaged in retailing liquor in that community to give up their business, and the doing of that is expressly condemned by the third section of this bill.

Stewart:[8] If an organization for the purpose of having laws passed creating high license is formed, would not that enhance the value of the things prohibited in this bill?

George: I have considered that question. I have thought possibly that the courts might say that the right of a political organization to bring about political results by legislation was not embraced within the provisions of the bill.

1 Kintner, at 77-79 (quoting 20 Cong. Rec. 1458-59 (February 4, 1889)).

The 50th Congress did not pass an antitrust law; nevertheless, as Kintner has noted "these proceedings shed light on Congress' motivation and its assessment of the economic, political, and legal forces which were operating in the country." 1 Kintner, at 15. The 51st Congress passed the antitrust bill in a relatively short time, and debated it for only seven days. *Id.* at 17. During these debates the Senate again discussed the interaction between the Sherman Act and the temperance movement:

Wilson:[9] I desire to offer an amendment to come in at the end of section 1 of the bill, and as an addition to the proviso contained in that section.

The Presiding Officer. The Secretary will state the amendment proposed by the Senator from Iowa.

The Chief Clerk. It is proposed to add at the end of the second proviso to section 1:

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[8] William M. Stewart (R. Nevada). *Id.* at 79.

[9] James F. Wilson (R. Iowa). *Id.* at 20.

Nor to any arrangements, agreements, associations, or combinations among persons for the enforcement and execution of the laws of any State enacted in pursuance of its police powers; nor shall this act be held to control or abridge such powers of States.

* * *

Hoar:[10] Allow me to ask the Senator if his amendment accomplishes his object. I understand his object is to protect combinations of persons intended to discourage the use and manufacture of intoxicating liquors.

Wilson: My object is to exclude them from the operation of the bill.

Hoar: I understand, to protect them from being affected by it. But the only description in his amendment is of such associations as are in aid of the execution of the laws of a State in pursuance of its police power. Now, if this bill without his amendment would render the class of persons subject to the penal provision, all temperance societies whose object is to persuade mankind not to use intoxicating liquors would still remain in spite of his amendment within the purview of bill. *It seems to me he should extend his amendment a little further, because, as far as my State goes, this class of associations which he has described do not confine their efforts to the execution of the law, but their efforts are a great deal more extensive and extend to discouraging the use or manufacture of intoxicating liquors altogether.* This is what he means, and we should all vote for it.

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[10] George F. Hoar (R. Massachusetts). *Id.* at 14.

Wilson: I am satisfied that my amendment will cover the purpose I have in view concerning my State. If other Senators desire something further in regard to their state, they can move it.

Hoar: I move to amend the Senator's amendment by adding to it:

Or to discourage the use or manufacture of intoxicating liquors.

And we will take a vote on that.

The Presiding Officer. The question is on agreeing to the amendment to the amendment.

Sherman: The Senator from Iowa showed me his amendment. As these organizations in Iowa are associated and organized something in the nature of a corporation, there might be some reason for believing that they possibly might fall within the clauses of the bill. Therefore, I have no objection to his amendment, but I do not see any reason for putting in temperance societies any more than churches or school-houses or any other kind of moral or educational associations that may be organized. Such an association is not in any sense a combination arrangement made to interfere with interstate commerce; but under the peculiar circumstances, upon the facts stated by the Senator from Iowa, I think it is very proper to make an exception of those organizations in Iowa which are really in aid of the execution of State law. I would apply it to all organizations which are using either moral or any other kind of means for the enforcement of local laws; but I do not think it is worth while to adopt the amendment of the Senator from Massachusetts, because that would

> include temperance societies. You might as well include churches and Sunday schools.

Id. at 250-52 (quoting 21 Cong. Rec. 2658-59 (1890)) (emphasis added).

Protests against establishments *legally* serving liquor were sometimes violent. *See* Jack S. Blocker, Jr., Give to the Winds Thy Fears: The Women's Temperance Crusade, 1873-1874, 50, 76-77, 197 (1985) (describing violence by protesters and against them). *See also* Joseph Gusfield, Symbolic Crusade: Status Politics & the American Temperance Movement (2d ed. 1986); Mother Stewart, Memories of the Crusade, A Thrilling Account of the Great Uprising of the Women of Ohio in 1873, Against the Liquor Crime (1972). Temperance "crusaders" as they were sometimes called, "physically attacked saloons, sometimes with hatchets, hammers, and other tools, destroying the stock of liquor and perhaps the furnishings as well." Blocker, at 50.

Other crusaders contented themselves with "peaceful" invasions, wherein they would descend *en masse* to pray and plead with druggists and saloon keepers to stop selling liquor. They also "stationed one or two women at each dealer's door, to plead with or simply embarrass those seeking to enter." *Id.* at 48. Often large numbers of crusaders would march on recalcitrant liquor sellers. A violent scuffle ensued when 100 crusaders descended upon a tavern in Columbus, Ohio. *Id.* at 197. Thirty entered the tavern and refused to leave, and the owner called the police. Before police arrived, one of the women crusaders fought with the proprietor and his wife. Although they left the premises when asked by the police, crusaders continued to picket the establishment. *Id.* To provide potential drinkers with a social alternative to the saloon, crusaders set up reading rooms and coffee houses. They offered such establishments in at least twenty locations in six states. *Id.* at 50. The violence surrounding the temperance movement was well-publicized, and legislators

were undoubtedly aware of the crusaders' activities. *See, e.g.*, Mother Stewart, Memories of the Crusade, 98-101 (1972) (discussing press coverage of crusaders' activities).

Commentators have pointed out the parallels between the modern-day anti-abortion protests and the temperance movement. "One is drawn to recall slavery and prohibition as the historical analogues to this controversy." Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 Ga. L. Rev. 923, 926 (1991). Indeed, the parallels are striking. Defendants here have entered clinics violently, assaulted personnel, and destroyed medical supplies. They lead large groups of protesters to health centers to persuade center staff to stop performing abortions. They confront patients and plead with them not to enter the centers. Wojnar and Terry have established "pro-life" pregnancy counseling centers, which like the temperance crusaders' coffee houses, purport to provide an alternative for the centers' services.

While the language of the congressional debates is not unequivocal, like the court in *Missouri v. NOW*, we believe it provides a fair indication that Congress did not intend to reach every activity that might effect business. As the Senator from Massachusetts remarked, even temperance organizations that went beyond the execution of state laws in discouraging people from consuming liquor were not to be covered by the Act. Sherman's comments mitigate this conclusion somewhat, because he discusses only those organizations attempting to bolster the execution of state laws.

Some of these comments foreshadow the development of the *Noerr-Pennington* doctrine, which protects businesses' and other associations' efforts to obtain a governmental imposition of a trade restraint. *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Lawline v. American Bar Association*, 956 F.2d 1378 (7th Cir. 1992). But, as we pointed out in our discussion of the background facts, the plain-

tiffs do not complain about petitioning. "The doctrine does not . . . protect purely private action not genuinely aimed at prompting governmental action." *Wilk v. American Medical Association*, 895 F.2d 352, 357 (7th Cir. 1990). *Cf. Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*, 518 F. Supp. 993 (1981) (*Noerr* does not protect attempt to eliminate a class of competitors—other fishermen—using violence, threats, vandalism).

Other cases successfully invoking the doctrine's protection have alleged in the complaint the petitioning activity. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1971) (state and federal administrative proceedings to bar plaintiffs' entry into trucking market); *Pennington*, 381 U.S. at 657 (influencing Secretary of Labor to enact labor standards); *Noerr*, 365 U.S. at 127 (false publicity campaign to convince legislators and governor to enact legislation harmful to competitors); *Lawline v. American Bar Association*, 956 F.2d 1378 (7th Cir. 1992) (lobbying state to adopt ethical rules). Because the defendants' acts are far removed from the direct petitioning protected in these cases, we do not believe they are protected by the *Noerr-Pennington* doctrine. In fact, the defendants' audacity in asserting that violence, criminal trespass, and vandalism are proteced by the First Amendment, rivals Carry Nation's—after inciting a riot by smashing up a saloon with an axe, she declared, "There is a spirit of anarchy abroad in this town!" Robert Lewis Taylor, Vessel of Wrath: The Life and Times of Carry Nation, 201 (1966).[11]

We are convinced by the economic and legislative history of the Sherman Act that it was intended to prevent business competitors from making restraining arrange-

[11] We also note Professor Fischel's point that "conduct unprotected by *Noerr* does not necessarily constitute an antitrust violation." Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis & Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 82 (1977).

ments for their own economic advantage. As the Court stated in *Allen Bradley Co. v. Union*, 325 U.S. 797, 811 (1945), "We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies."[12] Defendants are not involved in business, and have no ability to concentrate economic power. This, together with the striking parallels between their activities and those of the temperance crusaders, which Congress, it would seem, intended to exclude from the operation of the Act, forces us to conclude that the defendants' activities are not prohibited by the Sherman Act.

We are not the first court to conclude that certain agreements are not within the scope of the antitrust laws. In *Missouri v. NOW*, 620 F.2d at 1301, the Eighth Circuit concluded that Congress probably did not intend to include political boycotts by non-competitors. The court in *Marjorie Webster Jr. College v. Middle States Association of Colleges and Secondary Schools*, 432 F.2d 650, 653 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970), concluded that when restrictions on college accreditation have no commercial motive, "the process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself. We do not believe that Congress intended this concept to be molded by the policies underlying the Sherman Act." *Id.* at 655 (footnotes omitted). *See also Council for Employment & Economic Energy Use*, 580 F.2d 9, 12 (1st Cir. 1978) (Complaint alleging radio stations that agreed on amount of free air time for plaintiff's political opponent violated antitrust laws dismissed on 12(b)(6): "This case involves political opponents not commercial competitors; and political objectives not market place goals."), *cert. denied*, 440 U.S. 945 (1979).

We observe, as we did in *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 559 (7th Cir. 1980), that "it

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[12] *Allen Bradley* involved an illegal combination of a labor union, contractors, and manufacturers.

is hard to ignore the suspicion that the facts have been forced into an antitrust mold to achieve federal jurisdiction." We believe it is unfortunate that the plaintiffs lack an effective remedy for the defendants' reprehensible conduct, but we find no antitrust violation here. *But see Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991) (discussing besieged abortion clinic's claim under 42 U.S.C. § 1985(3)). Non-commercial purpose alone will not shield activity from antitrust scrutiny, *see Costello Publishing Co. v. Rotelle*, 670 F.2d 1035 (D.C. Cir. 1981) (dispute between lay and clerical members of Roman Catholic Church), but the defendants' acts are far beyond those that Congress intended to reach with the Sherman Act.

At bottom, the basic question presented by the plaintiffs' complaint is whether the antitrust laws protect an industry faced with violent opposition from some segment of the public. For example, could nuclear power providers or logging companies bring antitrust claims against the Earth First! organization for vandalism and trespass? *See, e.g.*, Glenn Bohn Vansun, *Walbran Activists Deny Link to Radical Environmental Group*, Vancouver Sun, Sept. 21, 1991, at A1 (describing sabotage of nuclear plant's electrical lines, tree spiking, and logging equipment damage). We do not believe these kinds of actions are within the scope of the antitrust laws. The defendants' actions are directed against *all* centers providing abortions.

The Court's analysis in *Apex Hosiery*, another case involving violent, "reprehensible" conduct by defendants which fell outside the scope of the Sherman Act, bolsters our conclusion that the plaintiffs' complaint was properly dismissed. 310 U.S. at 484. In *Apex Hosiery*, union members from nearby factories took over the plaintiff's plant and remained in possession for more than a month. *Id.* at 482. The invaders changed the locks, wilfully wrecked machinery, and damaged property and equipment. Operations at the plant could not resume for two months after the plaintiff regained possession. *Id.* The union acted to force the plaintiff to hire only union employees. *Id.* at 482.

The Court explained that although the union members violated the civil and penal laws of Pennsylvania, if no antitrust violation occurred, the violence and state-law violations did not confer federal jurisdiction. *Id.* at 483-84. The Court rejected the union's contention that all labor activities are exempt from Sherman Act, *id.* at 487, just as we reject defendants' contention that all "protest" or non-commercially oriented activities are exempt because of the First Amendment.

The Court analyzed the defendants' conduct, and determined that

> the Sherman Act was directed only at those restraints whose evil consequences are derived from the suppression of competition in the interstate market, so as 'to monopolize the supply, control its price or discriminate between its would-be purchasers.' And in speaking of intent as a prerequisite to liability under the Act where the restraint to interstate commerce is 'indirect' [we] mean no more than that the conspiracy or combination must be aimed or directed at the kind of restraint which the Act prohibits or that such restraint is the natural and probable consequences [sic] of the conspiracy.

Apex Hosiery, 310 U.S. at 511 (quoting *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 471 (1921)). The Court emphasized that the cases interpreting the Sherman Act recognized that "[t]he Sherman Act was not enacted . . . to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to monopolize the supply, control its price, or discriminate between its would-be purchasers." *Id.* at 512. Finally, the Court emphasized that "[r]estraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence." *Id.* at 513.

We find this reasoning applicable here. The plaintiffs have not alleged that the defendants are exercising market power to harm their businesses. Rather, the plaintiffs seek federal protection from the defendants' campaign of otherwise-criminal activities which are directed at destroying all health centers performing abortions. Plaintiffs have failed to make the required showing that the defendants have exerted market control of the supply of abortion services, control of price (beyond raising prices by increasing costs[13]), or discrimination between would-be purchasers.

The myriad cases upon which plaintiffs rely offer little help. We have found only one case where non-competitor defendants tried to destroy a plaintiff's business. *Council of Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920). In that case, the Counsel of Defense, a group of New Mexico residents, organized a boycott of the Hearst newspapers and magazines to protest what they perceived as Hearst's pro-German sympathies.

The court found the conspiracy to boycott and blacklist the publications was prohibited by the Sherman Act. We believe, however, that this case is no longer good law. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1981), the Court held that a sometimes-violent boycott organized by black people against white merchants was beyond the reach of economic regulation. *Id.* at 913. The boycott was designed to force civic and business leaders to comply with a list of demands for racial equality and integration. The Court, relying in part upon *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. at 127 (1961), held that the non-violent aspects of political boycotts are protected by the First Amendment.

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[13] This is not to say that cartels or would-be monopolists who try to injure competitors by raising costs are not subject to the antitrust laws. *See, e.g., Premier Electric Construction Co. v. National Electrical Contractors Ass'n*, 814 F.2d 358, 368 (7th Cir. 1987) (discussing anticompetitive effects, and thus illegality, of raising rivals' costs). *See also* 3 Milton Handler, Antitrust in Transition 1178-79 (1991).

Id. at 915. *Claiborne* calls into question the holding in *Council of Defense*. We conclude that *Council of Defense* is not controlling here.

Because we find that Congress did not intend to include defendants' activities within the scope of the Sherman Act, we affirm the district court's dismissal of the plaintiffs' antitrust claims.

IV. RICO

The Plaintiffs have also claimed that defendants Scheidler, Terry, Scholberg, Murphy, PLAL, Operation Rescue, and Project Life have violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962(a),(c),(d).

A. § 1962(a)

The plaintiffs alleged in count two of the complaint that PLAN, PLAL, and Operation Rescue violated § 1962(a)[14] because the donations they receive from supporters are derived from their racketeering activity. The racketeering activity is extortion under the Hobbs Act, 18 U.S.C. § 1951, directed at health centers, center employees, and patients. Plaintiffs asserted that "[i]t is well-known that the more outrageous and highly publicized the activities are, the more likely the RICO Defendants and the enterprises are to receive larger donations." RICO Case Statement, R. 469, at 22.

The district court dismissed the plaintiffs' claims under § 1962(a) because it found that the income defendants re-

[14] 18 U.S.C. § 1962(a) provides in relevant part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate commerce.

ceive through donations was not "derived directly or indirectly, from a pattern of racketeering activity." 765 F. Supp. at 941. Because contributors were not extorted, the court held that the contributions were not derived from racketeering activities.

In reaching its holding, the district court relied heavily upon *Hemmings v. Barian*, 822 F.2d 688 (7th Cir. 1987). In *Hemmings*, the defendant agreed to purchase the plaintiff's company for a cash downpayment, plus five subsequent cash payments and other consideration. *Id.* at 692. The plaintiff alleged that the defendant never intended to make the subsequent payments, and instead used the money to buy a second corporation. The plaintiff argued that the defendant violated § 1962(a) because the money saved by failing to make payments was "derived from a pattern of racketeering activity." *Id.*

We refused to accept this argument—we found that although the defendant may have used income he owed plaintiff to fund his second business, there was no suggestion that *that* income came from fraud. *Id.* The source of the misapplied income was "proper and aboveboard. The fraud was in promising to pay Hemmings the balance of the agreed purchase price . . ., when Barian had no intention of ever paying it." *Id.* Because the money was lawful income, not extracted from the plaintiff (or anyone else) by fraud, we refused to find a RICO violation.

Plaintiffs argue that *Hemmings* does not support the district court's holding because "in *Hemmings*, the defendant did not 'derive' the money from anything illegal—he already had it. Here, the defendants had the money only after their well-publicized, unlawful acts prompted their supporters to send them the money . . . ." Appellants' Brief at 48. This argument is unpersuasive. The plaintiffs argue based upon their reading of *Azurite Corp. v. Amster & Co.*, 730 F. Supp. 571, 578 (S.D.N.Y. 1990), that the *Hemmings* claim was dismissed because the plaintiff failed to plead a causal connection between the fraud and the income invested. Based on this reading,

plaintiffs argue that *Hemmings* does not dictate the dismissal of their claim under § 1962(a) because they pleaded a connection.[15]

Plaintiffs attempt to bolster this argument with references to *United States v. Vogt*, 910 F.2d 1184, 1194 (4th Cir.), *cert. denied*, 111 S. Ct. 759 (1991), and *United States v. McNary*, 620 F.2d 621, 628 (7th Cir. 1980). These cases are unavailing. In *Vogt*, the defendant, a customs officer, laundered bribe money through a group of dummy corporations that deposited money off-shore, brought it back into the United States, and then invested it. Vogt argued that the government failed to prove he invested the bribe money in the laundering enterprises. The court stated that "[s]ection 1962(a) does not exact rigorous proof of the exact course of income derived from a pattern of racketeering activity into its 'ultimate use or investment.' " *Id.* at 1194.

Plaintiffs point to this language in support of their contention that they adequately have alleged that the donations defendants receive are "derived" from their racketeering acts. This argument is specious—the Fourth Circuit was dismissing the argument that the government in its proof, must trace illegally received money "from its receipt to its ultimately proscribed 'use or investment' by the defendant." *Id.* In other words, plaintiffs in this case are not required to show the specific flow of contributions from the time the defendants receive them until they ultimately spend them. There was no question that Vogt derived income from racketeering—he took bribes.

McNary is analogous. McNary, as Mayor of Lansing, Illinois, was convicted of bribery and extortion. The issue on appeal was whether the government proved that McNary invested the $85,000 in bribery receipts in his family-owned travel company. We noted that the statute

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[15] *Azurite* held that defendants who were able to purchase stock at artificially low prices because of their fraudulent SEC filings derived income from the fraud within the meaning of § 1962(a).

does not require "immediate or even direct use of illicit income to establish a violation of its terms. . . . To require . . . that the evidence show a direct employment of illicit income is to ignore the clear proscription of the statute . . . ." *McNary*, 620 F.2d at 628. Plaintiffs again misapprehend this language. *See* Appellants' Brief at 49. In *McNary* we held that interim deposits, commingled funds, and other accounting techniques do not bar liability. Section 1962(a) does not require the government to trace the course of each penny of illicit income through the defendant's hands. *McNary*, 620 F.2d at 629.

Thus the cases the plaintiffs cite are inapposite to their claim—at issue here is whether the defendants' contributions were derived from their extortionate acts. We agree with the district court that they were not. Plaintiffs concede that the contributions are only "indirect" income from the extortionate acts, but they argue this is sufficient under § 1962(a). That section does sanction the use of funds "derived, directly or indirectly, from a pattern of racketeering activity." The attenuated causal connection between the defendants' criminal trespass, threats, and vandalism, and their receipt of donations from third parties, however, is not sufficient.

The Supreme Court has noted that notions of proximate cause are properly applied to RICO. *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992). In *Holmes*, the Court held that an insurance company could not recover under § 1962 based upon the defendants' fraud on its insured and its insured's customers. *Id.* Proximate cause generally is associated with the determination in civil tort litigation as to whether the plaintiff's injury was direct enough to permit him to recover from the defendant. *Id.* at 1318. Nevertheless, we believe this judicial tool for examining the directness of a relationship is helpful in this context. "At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.' " *Id.* (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Own, Prosser and Keeton on Law of Torts §41, p. 264 (5th ed. 1984)). The

cause and effect chain plaintiffs posit is something like this: defendants invade health centers, destroying property and injuring center staff; media covers event; potential contributors see media coverage and are favorably impressed; contributor sends donation; defendants receive income. Based in part upon notions of proximate cause, we believe this alleged relationship between the defendants' criminal acts and their supporters voluntary contributions is simply too tenuous to satisfy the requirements of § 1962(a).

We also find the cases interpreting the RICO forfeiture provisions of § 1963 support our conclusion. Section 1963(a)(1) requires that a defendant forfeit "any interest he has acquired or maintained in violation of § 1962 . . . ." In interpreting the term "interest" under this section, we have held that "the court must determine what portion of [the defendant's] interests would not have been acquired or maintained 'but for' his racketeering activities. *United States v. Horak*, 833 F.2d 1235, 1243 (7th Cir. 1987). *See also United States v. Ofchinick*, 883 F.2d 1172, 1183 (3d Cir. 1989) (applying *Horak*'s 'but for' test), *cert. denied sub nom., DeLucia v. United States*, 493 U.S. 1034 (1990); *United States v. Porcelli*, 865 F.2d 1352, 1365 (2d Cir. 1989) (same), *cert. denied*, 493 U.S. 810 (1989).

Following this reasoning, under § 1962(a), "income derived, directly or indirectly, from a pattern of racketeering activity" is only income that the defendants would not have received 'but for' their racketeering conduct. Here, plaintiffs have not alleged that contributors would not have donated money to the defendants but for the defendant's predicate racketeering acts. Therefore, the income is not derived from racketeering activity for purposes of § 1962(a).

B. § 1962(c)

In count three, plaintiffs allege that Pro-Life Action Network ("PLAN") operated as an enterprise in violation of § 1962(c). PLAN is a coalition of anti-abortion groups. The

defendants who have participated in PLAN activities, the "PLAN defendants," are Scheidler, Ryan, Terry, Scholberg, Murphy, Wojnar, Migliorino, Pro-Life Action League ("PLAL"), Pro-Life Direct Action League ("PDAL"), Operation Rescue ("OR"), and Project Life.

Section 1962(c) prohibits conduct of an enterprise through a pattern of racketeering activity.[16] *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). The district court dismissed the plaintiffs' § 1962(c) claims because it found that § 1962(c) requires that plaintiffs allege "some profit-generating purpose." *Scheidler*, 765 F. Supp. 937, at 943. The court read existing case law to require either the predicate acts of racketeering or the enterprise to have some financial motive. *Id.* at 942 (citing *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988), *cert. denied*, 488 U.S. 974 (1988)); *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir. 1985); *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir. 1983), *cert. denied*, 474 U.S. 1032 (1985); *United States v. Ivic*, 700 F.2d at 65; *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). The plaintiffs argue that only an economic effect on interstate commerce is required, which they have alleged.

Whether or not liability under RICO may be imposed when neither the enterprise nor the racketeering acts are economically motivated is a question of first impression in this circuit. The other circuits are split on the issue. *Compare United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988) ("For purposes of RICO, an enterprise must be directed toward an economic goal."); *United States v. Ivic*, 700 F.2d 51, 59-65 (2d Cir. 1983) (same) *with North-*

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[16] § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

east Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1349-40 (3d Cir. 1989) (because predicate offense (Hobbs Act) does not require economic motive, RICO requires no additional economic motive), *cert. denied*, 493 U.S. 901 (1989); *Feminist Women's Health Center v. Roberts*, No. C86-1617, 1988 WL 156656, *11 n.2 (W.D. Wash., Mar. 11, 1988) (citing *McMonagle* and declining to follow *Ivic*). In his dissent from the denial of certiorari in *McMonagle*, Justice White noted the conflict.

Although we have never grappled with the economic motive issue head on, we have adopted the Eighth Circuit's definition of enterprise, which includes an economic goal requirement. *United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986) (quoting *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981)), *cert. denied*, 479 U.S. 939 (1986). Other circuits have also adopted the *Anderson* formulation. *See United States v. Perholtz*, 842 F.2d 343, 363 (D.C. Cir. 1988); *United States v. Errico*, 635 F.2d 152, 156 (2d Cir. 1980).

Section 1961(1)(4) states that an enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact though not a legal entity." In this case, PLAN does not appear to have legal status as a corporation, partnership, or association recognized by state law. Rather, it is a group that organizes anti-abortion activities. Hence, it comes under the "group of individuals associated in fact though not a legal entity" portion of § 1961.

Anderson and *Neapolitan* provide the framework for determining whether an informal association is an enterprise. In *Anderson*, two court administrators were charged with defrauding their employers through a false purchase-order scheme. 626 F.2d at 1980. The indictment alleged that each defendant's association with the salesman who supplied the phony invoices constituted the enterprise. Now, of course, the government more routinely alleges that the

entities that employ such defendants are the enterprise, i.e. the sheriff's office, (*United States v. Lee Stoller Enterprises*, 652 F.2d 1313 (7th Cir. 1981), *cert. denied*, 454 U.S. 1082 (1981)), the state's attorney's office, (*United States v. Yonan*, 800 F.2d 164, (7th Cir.), *cert. denied*, 479 U.S. 1055 (1986)), etc. The *Anderson* court found that the enterprise must "signify an association that is substantially different from the acts which form the pattern of racketeering activity." *Anderson*, 626 F.2d at 1365. After a thorough analysis of the statutory language, the court held that the term enterprise

> encompass[es] only an association having an ascertainable structure which exists for the purpose of maintaining operations *directed toward an economic goal* that has an existence that can be defined apart from the commission of the predicate acts constituting the pattern of racketeering activity.

Id. at 1372 (emphasis added).

We adopted this holding in *Neapolitan*, where we too distinguished between the racketeering acts and the enterprise. 791 F.2d at 500. *Neapolitan* considered the enterprise in two RICO cases involving a stolen car ring. In one, police officers took bribes from car thieves, and were charged with conducting the sheriff's office (the enterprise) through a pattern of racketeering activity. In the other, the car thieves themselves operated a large scale "chop shop," which was allegedly the RICO enterprise.

As plaintiffs point out, economic motive was not an issue in either *Neapolitan* or *Anderson*. It was clear defendants were acting for financial gain. Another case adopting *Anderson*, *United States v. Errico*, 635 F.2d 152, 156 (2d Cir. 1980), did place some emphasis on the profit motive. *Errico* involved a conspiracy to fix horse races. The court found that a circle of betters and jockeys, joined together through the defendant, satisfied the enterprise requirement because they regularly attempted to and did profit from the illegally fixed races. *Id.* at 156.

The lack of significant focus on motive weakens the authority of these cases somewhat on this particular issue, however, so we turn to the cases that have confronted it directly. The leading case, *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983), involved a Croatian nationalist group that used "terror, assassination, bombings, and violence in order to foster and promote their beliefs and in order to eradicate and injure persons whom they perceived as in opposition to their beliefs." *Id.* at 58.

In a carefully reasoned opinion, the court in *Ivic* drew upon the language of the statute, its legislative history, Supreme Court precedent, and Justice Department Guidelines to determine that the enterprise or predicate acts must have an economic motive to violate RICO.

Reading 1962(c) together with sections (a) and (b), the *Ivic* court stated that the term enterprise in those sections referred to "an organized profit-seeking venture." *Id.* at 60. It noted there was no indication that Congress intended to have the same term mean something different in section (c). Indeed, the Supreme Court has stated that "We should not lightly infer that Congress intended [terms] to have wholly different meanings in neighboring subsections." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1984). The court examined the legislative history of the Act, and explained that the terrorist actions were not part of the "evil corruption of our commerce and trade" which the Act was intended to remedy. *Ivic*, 700 F.2d at 63 (quoting 116 Cong. Rec. 35295, remarks of Representative Poff).

The *Ivic* court observed that although *United States v. Turkette*, 452 U.S. 576 (1981), held that the term enterprise encompasses illegitimate organizations, it did not suggest the term reaches every such organization. *Turkette* recognized that RICO was originally directed at the infiltration of organized crime into legitimate business with funds raised through loan sharking, illegal gambling, and other criminal activities. *Id.* (citing *Turkette*, 452 U.S. at 591 (1981)). The *Ivic* court found that political terrorist

organizations do not generate funds that could allow them to infiltrate legitimate business. *Id.* This court has noted that although infiltration by organized crime was the major concern of Congress, those concerns extended much further. *Horoco v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984) (citing *Turkette*, 452 U.S. at 590-91), *aff'd*, 473 U.S. 606 (1985). In fact the Supreme Court has noted that "although [RICO] had organized crime as its focus, [it] was not limited in application to organized crime." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 248 (1989). Nevertheless, we believe congressional concerns may not have extended so far as the activities of political terrorists which involve neither economic crimes nor economic motivations.

The *Ivic* court also stated that the Justice Department's 1981 RICO Guidelines provided that a RICO indictment should not charge an association as an enterprise, unless the association exists "for the purpose of maintaining operations directed toward an economic goal . . . ." *Id.* at 64. Based on these factors, the *Ivic* court held that an indictment that fails to charge that the enterprise or predicate acts had an economic motive does not state a crime under § 1962(c).

The Second Circuit returned to the issue in *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983). *Bagaric* also involved a Croatian terrorist group, but the defendants also "perpetrated an extensive international extortion scheme using the United States and foreign mails." *Id.* at 46. The group, in addition to bombing, arson and murder, established a scheme to extort money from moderate Croatians in the United States to support their activities. *Id.* at 48. The group compiled a list of "potential wealthy victims, and threatened to squeeze [them] financially . . ." *Id.* Extortion letters demanding $5,000 to $20,000 were posted from foreign countries directed victims to mail money to a post office box in Paraguay. Several individuals who resisted the extortion demands were killed. 706 F.2d at 50.

The court held that because some of the predicate acts were economically motivated, i.e. extorting money to finance terrorist activities, RICO's economic motivation requirement was satisfied. It pointed out that *Ivic* did not require that economic gain be the sole motive of every RICO violation. *Id.* at 53. *Ivic* only required that either the predicate acts or the enterprise be geared toward economic gain. Political motivations would not shield the "more than fifty acts of the classic economic crime of extortion . . . ." simply because the money would be used for political ends. *Id.* at 58. Thus *Bagaric* reaffirmed *Ivic*'s holding that the government (or a civil plaintiff) may show financial purpose through either the enterprise or the predicate racketeering acts. *Id.* at 56.

The Second Circuit revisited the issue again in *United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985). *Ferguson* involved bank and armored-truck robberies, and murders performed to support the Black Liberation Army. The defendants challenged their indictment under RICO because they were "revolutionaries." *Id.* at 853. The court explained, however, that RICO requires only "some financial purpose." *Id.* The defendants were charged with ten robberies and attempted robberies, and the murders of police and guards committed during the course of the robberies. The money obtained from the crimes was used to support the "revolutionary" enterprise. Because the defendants' activities were centered around the commission of economic crimes, the court held that RICO was properly applied to the defendants. *Id.*

Shortly after *Ferguson* was decided, the Supreme Court rejected the Second Circuit's interpretation of § 1962(c), which barred civil actions unless the defendant had been convicted of criminal charges and the plaintiff could show "racketeering injury." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). Plaintiffs in this case argue that *Sedima* prohibits any limitation on the scope of RICO. Appellants' Brief at 37. We disagree. This court, in *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985), re-

jected the racketeering injury requirement, and held that injuries caused by the predicate acts of racketeering satisfy RICO. *Id.* at 388. We noted with some concern the Second Circuit's attempts to limit RICO to organized crime activities, and rejected that limitation.

Although we have resisted attempts to limit the scope of civil RICO, *see, e.g., Morgan v. Bank of Waukegan*, 804 F.2d 970, 975-76 (7th Cir. 1986) (multiple schemes not required for pattern of racketeering activity); *Schacht v. Brown*, 711 F.2d 1343 (7th Cir.) (rejecting argument that RICO limited to organized crime), *cert. denied*, 464 U.S. 1002 (1983), we do not believe the limitation imposed by the *Ivic, Bagaric, Ferguson*, line of cases is unwarranted. We recognize that "[e]ven if Congress did not anticipate all of the consequences of RICO, the breadth of the statute, including the civil provisions, was the result of deliberate policy choices on the part of Congress." *Haroco*, 747 F.2d at 398-99. But, as the Second Circuit discussed in *Ivic*, we believe the use of the term enterprise in §§ 1962(a) and (b) conveys a restriction to economic entities. *Ivic*, 700 F.2d at 61.

This court has also looked to the provisions of § 1962(a) to guide our interpretation of § 1962(c), albeit on a different point. *See Haroco*, 747 F.2d at 402 (interpreting interaction of roles of "enterprise" and "person"). The courts have extended the economic motivation limitation by allowing economically motivated predicate acts to bring conduct within the scope of RICO. Further expansion does not seem justified. "[W]e do not think the general principle of liberal interpretation of RICO can be used to stretch section 1962(c) to reach this situation in the face of the subsection's own limits." *Haroco*, 747 F.2d at 400.

Further, the Court in *Sedima* seemed particularly troubled by the vague, amorphous nature of the racketeering injury requirement. *Sedima*, 473 U.S. at 494-95. The economic motive requirement does not have this weakness. Moreover, the Court held that the statute requires only that the plaintiff allege each element of the viola-

tion, and that courts should not graft on additional elements. *Id.* at 497. In this case we do not believe we are adding elements to the offense, but merely fleshing out the definitions of those elements.

Further, despite its urging to avoid undue limitations of civil RICO, the Court has referred consistently to "businesses":

> Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises. Legitimate businesses enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences; and, as a result, § 1962(c)'s use against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued.

Northwestern Bell, 492 U.S. at 229. This emphasis on business—economic activity—bolsters our conclusion that non-economic crimes committed in furtherance of non-economic motives are not within the ambit of RICO. We also find support in the economic motive requirement discussed in *Anderson*, *Neapolitan*, and *Flynn*, *supra*.

We do not believe that requiring an economic motive will place undue limitations upon RICO actions. Nor do we believe our holding flies in the face of the Supreme Court's dictates in *Sedima* and *Northwestern Bell*. Indeed, we find that this interpretation of § 1962(c) is dictated by the terms of the statute. Thus, although we agree with the Third Circuit's interpretation of the Hobbs Act,[17] we

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[17] The Hobbs Act, 18 U.S.C. § 1951, which punishes obstruction of interstate commerce through extortionate means, does not require that the defendant profit economically from the extortion. *See Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 102 (2d Cir. 1990); *United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983) (defendant kidnapped and threatened to kill physician unless he agreed to cease performing abortions violated Act); *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975) ("solicitations" for religious purposes not exempt from Hobbs Act).

decline to follow its holding that, in these circumstances involving a non-economic enterprise committing non-economic predicate acts, plaintiffs may invoke the provisions of RICO. *McMonagle*, 868 F.2d at 1349-50.

The plaintiffs argue that, even if there is an economic motive requirement, they have alleged that the defendants committed unlawful acts to raise funds. More specifically, that the defendants received contributions as a result of their extortionate acts and, that they sold materials detailing unlawful methods of closing health centers. The plaintiffs argue that it is reasonable to infer from these allegations that the defendants committed extortionate acts to raise funds. In addition, they contend that defendants' activities were economically motivated because they were aimed at increasing the plaintiffs' costs of doing business. Increasing their costs, plaintiffs argue, satisfies the economic purpose requirement. Finally, plaintiffs argue that they are entitled to prove that the defendants intended to generate financial gain by selling materials advocating criminal acts against the centers.

There are several problems with these contentions. First, it is not reasonable to infer that the purpose of the defendants' extortion is to raise funds. It is clear that the aim of the extortion is to close women's health centers, as plaintiffs have repeatedly alleged throughout their complaint. *See* Second Amended Complaint at 3, 10, 11, 13, 14, 18, etc. That reprehensible criminal and tortious conduct results incidentally in donations to support it, is more a comment on the nature of the defendants' supporters than on the purpose of the defendants' acts.

Second, none of the cases discussing an economic motive requirement adopt the plaintiffs' theory that raising the victim's costs satisfies the requirement. In fact, *Ivic* itself seems to contradict such an interpretation. In *Ivic*, victims' businesses were threatened with arson and bombing. Certainly this would increase their "costs," although the defendants' motive in that case was political coercion unrelated to the operation of the businesses. *Ivic*, 700 F.2d

at 58. The plaintiffs' argument seems to be a vestige of the "raising rivals' costs" argument raised in their antitrust claim. We do not contest that the defendants' activities had an economic effect on the plaintiffs, we simply refuse to equate that effect with the economic motive required by *Ivic* and its progeny.

Finally, selling materials advocating a particular viewpoint, even if the materials advocate illegal actions, is not a predicate racketeering activity. Therefore income derived from the sales is not income derived from racketeering activity. Moreover, unless the materials violate the "clear and present danger" test, their distribution is protected by the First Amendment. *Cf. Cantwell v. Connecticut*, 310 U.S. 296, 308 (1939):

> No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, . . . or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.

For these reasons, we find no merit in the plaintiffs' argument that they have satisfied the economic motive requirement of § 1962(c).

C. § 1962(d)

Under count four, plaintiffs charge that PLAN, PLAL, and Operation Rescue conspired to violate sections 1962(a) and (c), an offense punishable by § 1962(d). Because plaintiffs claims under sections 1962(a) and (c) fail, we find no violation of § 1962(d).

V.

In conclusion, despite the reprehensible nature of the defendants' activities, we find that they are not within the reach of the Sherman Act or RICO. Therefore, the judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: June 29, 1992

BEFORE:

Honorable William J. Bauer, Chief Judge
Honorable Walter J. Cummings, Circuit Judge
Honorable Bruce M. Van Sickle, Senior District Judge*

No. 91-2468

NATIONAL ORGANIZATION FOR WOMEN, INCORPORATED, on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions, DELAWARE WOMEN'S HEALTH ORGANIZATION, INCORPORATED and SUMMIT WOMEN'S HEALTH ORGANIZATION, INCORPORATED, on behalf of themselves and all other similarly situated clinics,

Plaintiffs-Appellants,

v.

JOSEPH M. SCHEIDLER, JOHN P. RYAN, RANDALL A. TERRY, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 86 C 7888 — James F. Holderman, Judge

* The Honorable Bruce M. Van Sickle, Senior District Judge of the United States District Court for the District of North Dakota, is sitting by designation.

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 86 C 7888 Date: May 28, 1991

Name of Assigned Judge: James F. Holderman

Case Title: National Organization for Women, Inc., et al. v. Joseph M. Scheidler, et al.

* * * * *

DOCKET ENTRY:

* * * * *

(10) ☒ [Other docket entry:]

Enter memorandum opinion and order that defendants' motion to dismiss Count 1 and Counts 2-4 is granted. Due to lack of pendent jurisdiction, Counts 5-7 are dismissed. This cause of action is dismissed in its entirety. All pending motions, except for plaintiffs' pending motion for entry of final judgment on attorneys' fees are moot.

(12) ☒ [For further detail see ☒ order attached to the original minute order form.]

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 7888

NATIONAL ORGANIZATION FOR WOMEN, INC., DELAWARE WOMEN'S HEALTH ORGANIZATION, INC., and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., et al.,

Plaintiffs,

v.

JOSEPH M. SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE ACTION LEAGUE, INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE, and OPERATION RESCUE,

Defendants.

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Plaintiffs National Organization for Women ("NOW") and two women's health centers brought this action against various antiabortion activists, antiabortion organizations, and a pathology testing laboratory alleging that defendants conspired to drive women's health centers that perform abortions out of business through a pattern of concerted, unlawful activity in violation of the Sherman Antitrust Act, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and several pendent state claims.

In furtherance of the conspiracy, plaintiffs' second amended class action complaint alleges, *inter alia*, that

defendants threatened and intimidated clinic personnel and patients, trespassed on clinic property, invaded clinics and damaged clinic equipment, blocked ingress and egress to clinics, destroyed clinic advertising, coordinated telephone campaigns to tie up clinic lines, set up appointments under false pretenses to keep legitimate patients from making appointments, and established competing pregnancy testing and counseling facilities in the vicinities of the clinics.

Defendants Joseph Scheidler, Andrew Scholberg, Timothy Murphy, and the Pro-Life Action League, Inc. filed a motion to dismiss plaintiffs' second amended complaint for failure to state a claim upon which relief may be granted. For the reasons stated below, the motion is granted in part and denied in part.

DISCUSSION

I. COUNT I: SECTION ONE OF THE SHERMAN ANTITRUST ACT

Count I of plaintiffs' complaint alleges that defendants Scheidler, Ryan, Terry, Scholberg, Murphy, Wojnar, Migliorino, PLAL, PDAL, Operation Rescue, Project Life, and Vital-Med have restrained trade in violation of section one of the Sherman Act, 15 U.S.C. § 1. Defendants argue that the objective of their activities is "closing clinics by affecting public opinion, consumers' choices, physicians' revulsion, and legislators' votes," and "to convince others for non-economic reasons that the entire private abortion market ought to be banned, or 'decommodified.' " (Mem. in Support, pp. 13, 24.) Defendants assert that their activity "is non-economic but social, moral and political." (*Id.* at 24.)

The threshold question is whether the Sherman Act was intended to cover the conduct alleged here. Given the unique

issue presented by this case, guidance can be gleaned from an examination of United States Supreme Court cases concerning the application of antitrust laws to anti-competitive political conduct.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523 (1961), the Supreme Court held that concerted efforts to restrain or monopolize trade in order to petition government officials are protected from antitrust liability. In *Noerr*, the defendant railroads engaged in a publicity campaign with the purpose of fostering the adoption and retention of laws that would be destructive of the trucking business. *Id.* at 527. The Court characterized the publicity campaign as political activity and held that the "proscriptions of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena." *Id.* at 531. The Court refused to extend the Act to regulate political activities simply because they "have a commercial impact and involve conduct that can be termed unethical." *Id.* Significantly, the Court pointed out the "essential dissimilarity" between the publicity campaign and "agreements traditionally condemned by § 1 of the [Sherman] Act." *Id.* at 529.

Noerr immunity has been most recently discussed by the Supreme Court in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S. Ct. 1931 (1988) and *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 110 S. Ct. 768, 769 (1990) (hereinafter "*D.C. Lawyers*"). In *Allied Tube*, members of the steel industry packed an annual meeting of a private standard-setting association with new members solely to vote against a new type of electrical conduit that posed an economic threat to steel conduit. 108 S. Ct. at 1934-35. The Court found that the *Noerr* doctrine can immunize indirect as

well as direct petitioning of the government. *Id.* at 1938. Applying *Noerr*, the Court focused on the context and nature of the anticompetitive behavior. The Court compared the conduct at issue with conduct classically condemned by the Sherman Act. The Court denied petitioner the use of *Noerr* immunity because petitioner's activity was the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves. *Id.* at 1939. Unlike *Noerr*, the behavior was not political activity that has traditionally been regulated with extreme caution or activity that bears little if any resemblance to the combinations normally held violative of the Sherman Act. *Id.* at 1940.

The most recent Supreme Court case on *Noerr* immunity confirms the pivotal role that traditional anticompetitive conduct plays in the doctrine's application. In *D.C. Lawyers*, 110 S. Ct. 768, 769 (1990), a group of lawyers in private practice who regularly acted as court-appointed counsel for indigent defendants in District of Columbia criminal cases agreed to stop providing such representation until the District increased group members' compensation. The Court held that the agreement was a boycott that "constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act." *Id.* at 774. The horizontal agreement between the lawyers, who were in competition with one another prior to the boycott, constituted a "constriction of supply [which] is the essence of price fixing . . . [and] . . . was unquestionably a 'naked restraint' on price and output." *Id.* at 774-75. Once again, the Court's denial of *Noerr* immunity was based on its classification of the agreement as "classic" anticompetitive conduct as distinguished from political activity.

The court finds great similarity between this case and another case to which NOW was a party. *State of Missouri*

v. Nat'l Organization for Women, Inc., 620 F.2d 1301 (8th Cir. 1980), involved a convention boycott organized by NOW against all states that had not ratified the proposed Equal Rights Amendment. The court asked whether Congress intended to protect free and fair competition from political or social activities that can have the same effect upon competition as the commercial activities of a trust against a business. *Id.* at 1305. After a thorough analysis of the legislative history of the Sherman Act, the court concluded that it was anticompetitive conduct with commercial objectives that Senator Sherman had in mind as the concern of the bill, not anticompetitive conduct by noncompetitors motivated by noneconomic concerns. *Id.* at 1309. The Eighth Circuit in *State of Missouri* performed an equally thorough study of the relevant case law, the results of which confirmed the court's earlier conclusion that the Sherman Act was intended to regulate anticompetitive conduct that was financial, economic, or commercial objectives. *Id.* at 1313. The court found that, although NOW's boycott was an economic device, it was used in a non-competitive political arena in order to influence legislation and, as such, is not proscribed by the Sherman Act. *Id.* at 1315.

Similarly, a woman's right to have an abortion is a social or political issue—one of the most complex and contentious in American society today. The parties each have clear and loudly publicized views on the issue of abortion. Defendants' actions are not financially or commercially motivated. Defendants have an ultimate objective—legislation prohibiting abortions—and an intermediate goal—injury to abortion clinics. The intermediate goal is one of inflicting economic harm with the hope of achieving the ultimate objective. The intended harm to the relationships between the clinics and their customers parallels the in-

tended injury to the relationship in the *Noerr* case itself between the truckers and their customers. Since the injurious restraint is incidental to a valid effort to influence governmental action, the activity enjoys antitrust immunity even if unethical and deceptive methods have been used. *See Allied Tube*, 108 S. Ct. at 1936-37. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities. *Noerr*, 81 S. Ct. at 531. All of this caution would go for naught if this court permitted an extension of the Sherman Act to regulate the activities at issue simply because those activities have a commercial impact and involve conduct that can be termed unethical. *See id.*

Furthermore, unlike traditional antitrust matters (such as the situations presented in *Allied Tube* and *D.C. Lawyers*), the activities alleged here are not between competitors.[1] *Allied Tube* concerned an agreement between competitors in the conduit industry. *D.C. Lawyers* involved an agreement between competing attorneys. Even in *Noerr*, where immunity was granted, there was an agreement between commercial competitors in the long-

[1] In paragraph two of the complaint, plaintiffs allege that the parties are competitors in commerce. Plaintiffs state that defendants "established competing pregnancy testing and counseling facilities in the vicinities of the clinics, sometimes in the same buildings where clinics are located, homes for pregnant women and, on information and belief, prenatal and delivery services, foster homes and private adoption agencies." Although Fed. R. Civ. P. 8(a) requires only "a short and plain statement of the claim," this obscure reference to commercial competition between the parties is the sole allegation in the complaint of the commercial nature of defendants' activities. As such, it does not constitute the "plain" statement necessary to provide notice and state a claim for relief under the Sherman Act.

distance freight hauling business. Here, as in *State of Missouri*, none of the parties are commercial competitors. The "essential dissimilarity" between the alleged conduct and the conduct traditionally regulated by antitrust laws is of a greater magnitude in this case than that in *Noerr* itself. Thus, the Supreme Court's reasons in *Noerr* for not applying antitrust laws apply with greater weight to this case, which involves political opponents, not commercial competitors, and political objectives, not marketplace goals.

For these reasons, the Court finds that the Sherman Act does not apply to the defendants' anticompetitive actions alleged in the complaint. Accordingly, Count I must be dismissed.

II. RICO COUNTS

A. SECTION 1962(a)

Count II of plaintiffs' complaint alleges a violation of 18 U.S.C. § 1962(a), which makes it

> unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise. . . .

Plaintiffs allege that defendants received contributions in support of their racketeering activities and that defendants invested that income in the various defendant organizations to further the illegal goals of the organizations. (Complaint, ¶¶ 100-104).

In order to state a claim under § 1962(a), income must be "derived, directly or indirectly, from a pattern of racketeering activity." Plaintiffs claim that the donations re-

ceived from defendants' supporters were derived from defendants' illegal acts. Plaintiffs state that "[i]t is well-known that the more outrageous and highly-publicized the activities are, the more likely the RICO Defendants and the enterprises are to receive large donations." (RICO Case Statement, p. 22.) The court believes that the receipt of donations from supporters of the defendant organizations does not constitute income derived from a pattern of racketeering activity. The racketeering activity alleged in the complaint is extortion. The extortion was addressed, either directly or indirectly, at clinics and employees and patients of those clinics. Supporters of defendant organizations were not extorted, either directly or indirectly, into contributing to the organizations. While supporters may have contributed in order to promote the extortionate activities of defendants, their contributions in no way were derived from the pattern of racketeering alleged in the complaint. *See Hemmings v. Barian*, 822 F.2d 688, 692 (7th Cir. 1987) (§ 1962(a) claim fails because the income received was not derived from the racketeering activity alleged in the complaint, but instead was income from sources that were proper and aboveboard). Thus, plaintiffs' RICO claim under § 1962(a) must fail.

B. SECTION 1962(c)

Count III of plaintiffs' complaint alleges a violation of 18 U.S.C. § 1962(c). A violation of § 1962(c) requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 3285 (1985). In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation of § 1962(c). *Id.*

Defendants contend that RICO requires that the predicate acts or the enterprise be economically motivated. The circuits which have explicitly addressed this issue are in conflict on the need for an economic motive. As noted by Justice White, the Second and Eighth Circuits require a profit-making element, while the Third Circuit does not. *McMonagle v. Northeast Women's Center, Inc.*, 110 S. Ct. 261 (1989) (denial of petition for writ of certiorari) (White, J., dissenting).

The Second Circuit has held that either the predicate acts of racketeering or the enterprise must have some financial motive. *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir. 1985); *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir. 1983); *United States v. Ivic*, 700 F.2d 51, 65 (2d Cir. 1983). However, the economic motive need not surmount all other motives.

In *Ivic*, the Second Circuit held that subsection 1962(c) has an economic motive requirement. *Id.* at 60. The court discussed the use of the term "enterprise" in 1962(a) and (b),[2] concluding that "the term 'enterprise' [in subsections (a) and (b)] quite clearly refers to . . . the sort of entity which one joins to make money. . . . [A]n 'enterprise', as used in these subsections, is evidently an organized profit-seeking venture." *Id.* The court adhered to the rule that when the same word is used in the same section of an act more than once, and the meaning is clear in one place, it will be assumed to have the same meaning in

[2] Section 1962(a) makes it unlawful to use funds derived from a pattern of racketeering or from the collection of an unlawful debt to acquire an interest in or to establish or operate an enterprise engaged in or affecting interstate or foreign commerce. Section 1962(b) makes it unlawful to acquire or maintain an interest in or control of an interstate enterprise through a pattern of racketeering activity or through collection of an unlawful debt.

other places. *Id.* Thus, the court found a requirement for a profit-generating motive in subsection (c).

The Eighth Circuit has also held that an enterprise must be directed toward an economic goal. *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988); *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980). In *Anderson*, the Eighth Circuit stated:

> We hold that Congress intended the phrase 'a group of individual's associated in fact although not a legal entity,' as used in its definition of the term 'enterprise' in section 1961(4), to encompass only an association having an ascertainable structure *which exists for the purpose of maintaining operations directed toward an economic goal* that has an existence that can be defined a part from the commission of the predicate acts constituting the 'pattern of racketeering.'

Anderson, 626 F.2d at 1372 (emphasis added). The court in *Anderson* set forth this economic goal requirement as part of its discussion of a distinct enterprise requirement. Although the court did not fully explain the reason for the economic goal requirement, the court earlier determined that, as the Second Circuit did in *Ivic*, the meaning of "enterprise" in subsection 1962(c) is the same as in subsections 1962(a) and (b). *Id.* at 1366 n.12.

In *Flynn*, the Eighth Circuit was directly faced with the issue of an economic motive requirement in RICO. The court relied on *Anderson* and *Ivic* when it held that an enterprise must be directed toward an economic goal. *Flynn*, 852 F.2d at 1052. In finding this requirement met, the court noted that the members of the enterprise directed their activities toward controlling St. Louis labor unions, thereby enhancing their own finances and influence. *Id.*

In *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989), the Third Circuit focused on the need for an economic motive in a RICO claim that was predicated on violations of the Hobbs Act. In *McMonagle*, a women's health center brought a RICO action against antiabortionist activities for intimidation and harassment of the center's employees and activities. The court held that since no economic motive is necessary under the Hobbs Act, no economic motive is required when the Hobbs Act is used as a predicate under RICO. *Id.* at 1350. Thus, the Third Circuit avoided the question of whether an economic motive was required under the RICO statute itself.

The Seventh Circuit has not directly addressed the issue of an economic motive requirement in RICO. However, in *United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986), the Seventh Circuit adopted the Eighth Circuit's definition of "enterprise" found in *Anderson*.[3] Two district judges of the Northern District of Illinois in published opinions have also adopted the *Anderson* definition of enterprise. *See Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 749 F. Supp. 869, 877 (N.D. Ill. 1990) (Aspen, J.); *United States v. Walters*, 711 F. Supp. 1435, 1448 (N.D. Ill. 1989) (Marovich, J.).

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[3] This court recognizes that the Seventh Circuit in *Neapolitan* was discussing the requirement for the existence of a RICO enterprise separate from a RICO conspiracy, and was not directly addressing the existence of an economic motive requirement. However, by adopting the definition of "enterprise" from *Anderson in toto*, the Seventh Circuit appears to have approved the requirement that a RICO "enterprise" must exist "for the purpose of maintaining operations directed toward an economic goal." 791 F.2d at 500.

In light of the reasoned opinions of the Second Circuit concerning the RICO economic motive requirement, the similar holding of the Eighth Circuit, the questionable reasoning by the Third Circuit, and the Seventh Circuit's apparent adoption of the economically-motivated "enterprise" definition, this court holds that an economic motive requirement exists to the extent that some profit-generating purpose must be alleged in order to state a RICO claim.[4]

The Second Circuit's opinions in *Ivic*, *Bagaric*, and *Ferguson* provide three different factual situations which demonstrate the Second Circuit's application of the economic motive requirement. In *Ivic*, defendants were Croation activists who were committed to achieving independence for their homeland. *Ivic*, 700 F.2d at 53. The indictment charged that the "primary object" of the criminal

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[4] Plaintiffs assert that defendants' "activities have decreased the business of, and/or increased the cost of doing business at . . . clinics." (Complaint, ¶ 105.) The business injuries include increased cost for laboratory services, increased insurance costs for clinics, increased costs for security guards, increased costs for rental space, lost business, and general harassment. (RICO Case Statement, ¶15.) The three cases from the Second Circuit and the two cases from the Eighth Circuit discussed herein approach the economic motive requirement as whether the enterprise or pattern of racketeering was profit-generating, and not whether they were cost-enhancing. In fact, the Second Circuit's opinion in *Ivic*, relied on by the Eighth Circuit in *Flynn*, clearly states that a RICO enterprise "is evidently an organized profit-seeking venture." *Ivic*, 700 F.2d at 60. In finding that the government had not met the economic motive requirement, the court determined that the "[d]efendants joined together not to make money." *Id.* No case applying the RICO economic motive requirement has discussed an increase in costs incurred by a plaintiff resulting from a defendant's conduct as a way to meet the requirement. Therefore, this court interprets the economic purpose requirement as an intent by the defendant to generate financial gain for the defendant, and not as an intent by the defendant to increase costs incurred by the plaintiff.

enterprise was to "use terror, assassination, bombings, and violence in order to foster and promote their beliefs and in order to eradicate and injure persons whom they perceived as in opposition to their beliefs." *Id.* at 58.

When the court applied the economic motive requirement to the facts, the court found the requirement unmet:

> Defendants joined together not to make money but . . . to advance the goal of Croatian independence. They undertook to murder Badurina and to bomb the dance studio and the travel agency not to obtain money, but rather to eliminate political opponents, win publicity, or otherwise further their chosen cause.

Id. at 60-61. In a footnote, the court distinguished these facts from cases where terrorist organizations have engaged in robbery or extortion to obtain money to further their activities. *Id.* at 61 n.6.

In *Bagaric*, the government charged members of a Croatian terrorist group with the predicate acts of extorting money from unsympathetic Croatians in order to provide financial support for their other illegal activities. *Bagaric*, 707 F.2d at 46-52. The court found that the predicate acts were "classic economic crime[s]" that "were carried out either to compel payment or in retaliation for refusal to meet appellants' extortionate demands." *Id.* at 58. The government's case involved the extortion of money from "moderate Croatians" to help finance defendants' criminal enterprise. *Id.*

Similarly, in *Ferguson*, the Second Circuit allowed a RICO prosecution against members of the Black Liberation Army who were charged with predicate acts including armored truck robberies and the use of stolen money to maintain safe houses and to support members of the group. *Ferguson*, 758 F.2d at 853. The court emphasized

that, unlike *Ivic*, "the defendants' activities centered around the commission of economic crimes" including ten robberies and attempted robberies of armored trucks in order to obtain money to further their activities. *Id.*

Of the three Second Circuit cases, the instant case is most analogous to *Ivic*. According to plaintiffs' pleadings, the primary objective of the alleged enterprise and its pattern of predicate acts was to drive clinics that perform abortions out of business.[5] While plaintiffs do allege that defendants received monetary benefits from the enterprise in the form of voluntary donations from supporters, this does not meet the level of economic motivation set out by the Second Circuit. In both *Bagaric* and *Ferguson*, the court found that "some financial purpose" existed. The court reasonably labeled the predicate acts of extortion of money, in *Bagaric*, and armored truck robberies, in *Ferguson*, as "economic crimes." In both of these cases, the predicate acts were crimes in which the necessary goal was to obtain money. The money was then to be used to further the central activities of the enterprise.

Here, defendants alleged acts were directed, as in *Ivic*, toward "eradicat[ing] and injur[ing] persons whom they perceived as in opposition to their beliefs." *See Ivic*, 700 F.2d at 58. The motivation for destroying clinic property, threatening clinic employees, and blocking access to clinics, among other alleged acts, was not to obtain money, but rather to otherwise further their antiabortion cause by

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[5] *See, e.g.*, Second Amended Complaint, ¶¶ 1, 3, 26, 27, 28, 29, 30, 96; RICO Case Statement, ¶ 2, 3, 5(f)(2), 5(g), 8. As stated in the RICO Case Statement, "[t]he predicate acts . . . are related in that they have been organized and executed . . . to further the enterprises' goal of closing through extortionate acts, all women's health centers that provide abortion services." (¶ 5(g).)

limiting the availability of abortion services and winning publicity for their cause. The fact that such activity may have also resulted in an increase in voluntary donations to the enterprise is not sufficient to allege the economic motivation requirement of RICO.

The economic motive requirement would lose all meaning should the courts consider an enterprise to be economically motivated solely because that enterprise happens to receive voluntary donations to support the continuation of racketeering activities directed toward a nonfinancial objective. If this were the case, a plaintiff in a RICO action could meet the economic motive requirement simply by alleging that the defendant sought to receive some voluntary financial support from bystanders harboring sympathy for the defendant's pattern of racketeering activities and that the defendant was motivated by the possibility of gaining financially from the voluntary contributions of those sympathizers during the course of the activities. This result is nonsensical, and the court refuses to adopt it.

C. SECTION 1962(d)

Count IV alleges a RICO claim under 1962(d). Section 1962(d) makes it "unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." Since plaintiffs' claims under sections 1962(a) and (c) cannot stand, plaintiffs' section 1962(d) claim must also fail.

III. PENDENT STATE CLAIM

Having dismissed the federal claims in plaintiffs' complaint, all that remains are pendent state law claims. The

general rule is that the court should relinquish jurisdiction over any pendent state law claim when the federal claims are dismissed before trial. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). Accordingly, the court dismisses the pendent state claims.

CONCLUSION

For these reasons, defendants' motion to dismiss Count I (under the Sherman Act) and Counts II-IV (under RICO) of plaintiffs' second amended class action complaint is GRANTED. Due to lack of pendent jurisdiction, Counts V-VII of the complaint are DISMISSED. This case is dismissed in its entirety. All pending motions, except for plaintiffs' pending motion to enter final judgment on attorneys' fees, are moot.

ENTER:

JAMES F. HOLDERMAN
JAMES F. HOLDERMAN
United States District Judge

DATED: May 28, 1991

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,
Plaintiffs,

v.

JOSEPH M. SCHEIDLER, et al.,
Defendants.

CASE NUMBER 86 C 7888

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that motion to dismiss Counts I and II-IV of the second amended class action complaint is granted. Due to lack of pendent jurisdiction, Counts V-VII are dismissed. This cause of action is dismissed in its entirety. All pending motions, except for plaintiffs' motion for entry of final judgment on attorneys' fees, are moot.

There being no just reason for delay, this is a final and appealable order.

May 28, 1991
Date

/s/ H. STUART CUNNINGHAM
Clerk

/s/ KATHLEEN BRANCH
(By) Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 7888 Date: July 31, 1990

Name of Assigned Judge: JAMES F. HOLDERMAN

Case Title: N.O.W. v. Scheidler

MOTION:

Vital-Med Motion to Dismiss Counts I and VII of Second Amended Complaint

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Vital-Med's motion to dismiss Counts I and VII of Second Amended Complaint is DENIED.

* * * * *

(12) ☒ (For further detail see ☒ order on the reverse of the original minute order form.)

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86 C 7888

Vital-Med has moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Counts I and VII of plaintiffs' Second Amended Complaint.

Count I asserts a violation of section one of the Sherman Anti-Trust Act, 15 U.S.C. § 1, by reason of an alleged agreement among Vital-Med and the PLAN defendants to restrain trade. The alleged agreement, the pleading alleges, was entered into for the purpose of forcing women's health centers that provide abortions out of business. (Complaint, ¶ 86.)

Count VII of plaintiffs' pleading alleges that Vital-Med owed a duty of confidentiality to the plaintiff clinics and the women whose fetal specimens were sent to Vital-Med for pathology testing and disposal. (Complaint, ¶ 131.) Vital-Med's duty allegedly was breached when it failed (1) to establish any security procedures to ensure that the identity of women having abortions would remain confidential; and (2) when it failed to ensure proper sanitary disposal of the remains. (Id.)

Vital-Med's motion is denied.

As the court has ruled previously, the court believes that plaintiffs have adequately alleged an antitrust violation. Vital-Med's arguments with regard to, *e.g.*, the existence (or lack thereof) of anticompetitive effect and respondeat superior liability are best presented in the context of a summary judgment motion.

The court also concludes that Count VII states a cause of action. It is unclear from the Complaint whether Count VII sounds in contract or tort. In their memorandum in opposition to Vital-Med's motion, plaintiffs assert that Vital-Med owed a contractual duty to keep patient information confidential and provide the laboratory results only to the clinics. (*See* Plaintiffs' Mem. in Opposition to Vital-Med's Motion to Dismiss, p. 21.) The court also believes that if Vital-Med's services were necessary to the care offered to patients by the physicians associated with the plaintiff clinics, then the statutory duty of Ill. Rev. Stat. ch. 110, § 8-802 owed by the physicians to those patients was also owed by Vital-Med. The court believes, moreover, that the plaintiff clinics have standing to assert the

violation of the privilege. *Cf. Parkson v. Central DuPage Hospital*, 105 Ill. App. 3d 850, 61 Ill. Dec. 651, 653 (1st Dist. 1982) (hospitals had standing to assert physician-patient privilege on behalf of non-plaintiff patients to bar production of their medical records when neither patients nor treating physicians were parties to suit).

Accordingly, Vital-Med's motion to dismiss is DENIED. Vital-Med shall file an Answer to the Second Amended Complaint on or before August 17, 1990.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 7888 Date: April 23, 1990

Name of Assigned Judge: JAMES F. HOLDERMAN

Case Title: N.O.W. v. Scheidler, et al.

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DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Defendant Wojnar's motion to dismiss the amended complaint is denied. Responsive pleading is due May 7, 1990. Status hearing is set for May 17, 1990 at 10:00 a.m.

* * * * *

(12) ☒ (For further detail see ☒ order on the reverse of the original minute form.)

* * * * *

86 C 7888

Mr. Wojnar has moved the court pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss him from counts I and V of the amended complaint on the ground that those counts fail to state a claim upon which relief can be granted. Mr. Wojnar contends (1) that the allegations of the complaint fail to allege either an antitrust violation or a tort cognizable under Illinois law; and (2) that his activities are

protected under the First and Fourteenth Amendments. More particularly, Mr. Wojnar asserts that he is immune from suit under the doctrine established by *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523 (1961) ("*Noerr*") and further defined in *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409 (1982).

The amended complaint (the allegations of which the court assumes for purposes of this motion to be true) alleges that Mr. Wojnar runs a number of anti-abortion women's medical clinics in the Chicago area and is the director of the Des Plaines Pro-Life Women's Center. (¶ 14.) Mr. Wojnar is alleged to have participated in a conspiracy to steal approximately 4,000 specimens of fetal remains from Vital-Med, a research laboratory which, at least formerly, conducted pathology testing for some of the plaintiffs. (¶¶ 65-69.) Vital-Med has notified these plaintiffs that it will no longer accept fetal specimens from the clinics for analysis. (¶ 77.) The complaint alleges that Mr. Wojnar's activities were intended to have, and indeed have had, an anti-competitive effect and threaten to restrain interstate trade. (¶¶ 82-83.) His activities are also alleged to have tortiously interfered with the plaintiff clinics' business relationship with Vital-Med. (¶¶ 116-123.)

In *N.A.A.C.P. v. Claiborne Hardware*, the Supreme Court held that the First Amendment protected the "peaceful political activity" (102 S. Ct. at 3425) of certain boycotters of white merchants, the objective of which was to vindicate "rights of equality and freedom lying at the heart of the Constitution . . ." (*Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931, 1941 (1988)). In both *Claiborne Hardware* and in *Noerr* the Supreme Court held that antitrust immunity attached because a major purpose of the challenged activity was to influence governmental action. *See Claiborne Hardware*, 102 S. Ct. at 3425-26.

Since, according to the allegations of the complaint, many of Mr. Wojnar's alleged activities were far from

peaceful, and because no showing has been made that a major purpose of the alleged activity was to either influence governmental action or secure long-established rights protected by the Constitution, the court must find at least at this point that *Noerr* immunity does not offer Mr. Wojnar any protection. The amended complaint, interpreted most favorably to the plaintiffs, states that Mr. Wojnar's activities were at least partially, if not primarily, intended to cause the clinics severe economic harm and lessen competition by putting them out of business. Accordingly, Mr. Wojnar's motion to dismiss is DENIED.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 7888 Date: October 1, 1987

Name of Assigned Judge: James F. Holderman

Case Title: National Organization for Women, Inc., et al. v. Joseph M. Scheidler, et al.

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Defendants' motion to reconsider is denied. Defendants' motion for certification under 1292(b) is denied.

Status hearing is set for October 27, 1987 at 10:00 a.m.

* * * * *

(12) ☒ [For further detail see ☒ order on the reverse of the original minute order form.]

* * * * *

ORDER

On July 2, 1987 this court denied defendants' Motion to Dismiss. Before the court is defendants' motions (1) to reconsider and (2) for certification under 28 U.S.C. §1292(b) of this court's July 2, 1987 decision.

Defendants in their motion to reconsider do not raise new issues or present new evidence. This court continues to hold that under *Conley v. Gibson*, 355 U.S. 41 (1957) and *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984) plaintiffs have sufficiently pled a conspiracy in restraint of trade within the meaning of the Sherman Act. Defendants' Motion to Reconsider is therefore denied.

This court also denies defendants' motion for §1292(b) certification of this court's July 2, 1987 decision. Plaintiffs have not persuaded this court that an immediate appeal from this court's July 2, 1987 order may "materially advance the ultimate termination of the litigation." Plaintiffs represent that they can be ready for trial in six months. An appeal would end this litigation only if it resulted in a reversal and would, in any event, surely take longer than six months.

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 7888 Date: July 2, 1987

Name of Assigned Judge: James F. Holderman

Case Title: National Organization for Women, Inc., et al. v. Joseph M. Scheidler

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Defendants' motion to dismiss is denied. Status hearing is set for July 15, 1987 at 10:00 a.m.

* * * * *

(12) ☒ [For further detail see ☒ order on the reverse of the original minute order form.]

* * * * *

ORDER

On October 17, 1986 the National Organization for Women (NOW), the Delaware Women's Health Organization (DWHO) and the Ladies Center of Pensacola (Ladies Center) filed this action against Joseph Scheidler, John Patrick Ryan and two anti-abortion organizations. Plaintiffs charge that defendants violated section one of the

Sherman Act, 15 U.S.C. § 1 by combining to shut down abortion clinics. Plaintiffs seek injunctive and declaratory relief.

Before the court is defendants' motion to dismiss under Federal Rules 12(b)(1) and 12(b)(6).

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957). When evaluating a motion to dismiss, a court accepts the plaintiff's allegations as true and draws reasonable fact inferences in his favor.

A complaint should not be dismissed for want of subject matter jurisdiction unless the claims are "so insubstantial, implausible, foreclosed by prior decisions or otherwise so completely devoid of merit so as not to involve a federal controversy within the jurisdiction of the District Court." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 66, 666-7 (1974).

Applying the above liberal standards, this court cannot dismiss plaintiffs' complaint. Plaintiffs may be able to show that (1) they suffered antitrust injury; (2) they have standing; (3) defendants substantially affected interstate commerce; and (4) defendants' actions are within the Sherman Act.

Defendants' motion to dismiss is DENIED.

APPENDIX G

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 4, 1992.

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. BRUCE M. VAN SICKLE, Senior District Judge[1]

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions, DELAWARE WOMEN'S HEALTH ORGANIZATION, INCORPORATED and SUMMIT WOMEN'S HEALTH ORGANIZATION, INCORPORATED, on behalf of themselves and all other similarly-situated clinics,

Plaintiffs-Appellants,

No. 91-2468 *v.*

JOSEPH M. SCHEIDLER, JOHN P. RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE ACTION LEAGUE, INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE, and OPERATION RESCUE,

Defendants-Appellees.

---

[1] The Honorable Bruce M. Van Sickle, Senior Judge of the United States District Court for the District of North Dakota, is sitting by designation.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 86 C 7888 — James F. Holderman, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon,[2] and all of the judges on the original panel have voted to deny the petition for rehearing and suggestion for rehearing en banc.

Accordingly, it is hereby ordered that the aforesaid petition for rehearing and suggestion for rehearing en banc be and the same is hereby DENIED.

[2] The Honorable Kenneth F. Ripple, did not participate in the consideration of the suggestion for rehearing en banc.

(2)

No. 92-780

FILED
DEC 4 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

v.

JOSEPH M. SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE, and OPERATION RESCUE,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONSE OF VITAL-MED LABORATORIES, INC. TO PETITION FOR WRIT OF CERTIORARI

Of Counsel:
ROBERT MARC CHEMERS
Counsel of Record
SCOTT O. REED
MARK D. ROTH
ANNE SCHEITLIN JOHNSON
PRETZEL & STOUFFER, CHTD.
One South Wacker Drive
Chicago, Illinois 60606
(312) 346-1973

CHARLES F. REDDEN
MARK D. ROTH
PRETZEL & STOUFFER, CHTD.
One South Wacker Drive
Chicago, Illinois 60606
(312) 346-1973

Attorneys for Respondent,
VITAL-MED LABORATORIES, INC.

Midwest Law Printing Co., Chicago [illegible]

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QUESTION PRESENTED

Whether this Court should review a decision of the Seventh Circuit Court of Appeals which as to Vital-Med Laboratories, Inc. upheld the dismissal of Count I of Petitioners' Second Amended Complaint in that Petitioners failed to adequately allege any violations of the Sherman Act and where Petitioners have failed to show any conflict with any decision of this Court or with the decisions of any Circuit Court of Appeals.

RULE 29.1 STATEMENT

Vital-Med Laboratories, Inc. has no parent or subsidiary companies. Vital-Med was owned by Dr. Samuel Shih and Washington National Insurance Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

v.

JOSEPH M. SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE, and OPERATION RESCUE,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONSE OF VITAL-MED LABORATORIES, INC. TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below are adequately described in the Petition, however, the opinion of the Seventh Circuit Court of Appeals has been published at 968 F.2d 612.

STATEMENT OF JURISDICTION

The statement of jurisdiction is properly set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are properly set forth in the Petition.

STATEMENT OF THE CASE

The statement of the case set forth in the Petition fails to adequately describe Vital-Med Laboratories, Inc. and those allegations directed against it which were found to be insufficient by the Circuit Court. Further, the basis for the Circuit Court's ruling with respect to the Sherman Act is mischaracterized by Petitioners in the statement of the case.

Vital-Med Laboratories, Inc. ("Vital-Med") provided pathology and disposal services on fetal remains shipped to it in Northbrook, Illinois, by the Plaintiff-clinics, Delaware Women's Health Organization ("DWHO") and Summit Women's Health Organization ("SWHO"). It also performed these services for four other clinics managed by National Women's Health Organization, the management company for DWHO and SWHO. It no longer performs those services. Vital-Med was owned by Dr. Samuel Shih and Washington National Insurance Company.

Plaintiffs[1] originally filed this suit in 1986 against several pro-life advocates and their organizations. They sought injunctive relief and monetary damages resulting from those

[1] The term "Plaintiffs" refers to the Petitioners and the terms are used interchangeably.

Defendants' activities, which included picketing and blockading abortion clinics.

Vital-Med was not joined as a defendant until February, 1989. Plaintiffs' Second Amended Complaint against Vital-Med asserted Sherman Act violations and a pendent state-law statutory confidentiality claim. No RICO allegations were ever made against Vital-Med.

Plaintiffs alleged that in early 1988, an unidentified person claiming to be a Vital-Med employee telephoned co-Defendant Conrad Wojnar, and told him that fetal remains could be removed from the loading dock on Vital-Med's premises. The remains were then stolen from Vital-Med. Plaintiffs alleged that one or more unidentified Vital-Med employees saw the theft, but did nothing to stop it. The remains were shipped throughout the country and used in public burial ceremonies to denounce abortion.

Effective January 1, 1989, after the theft of fetal remains, Vital-Med stopped performing pathology and disposal services for these and other clinics. Since then, the Plaintiff-clinics obtained other sources for these services.

In Count I of the Second Amended Complaint, Plaintiffs contended that Vital-Med's complicity in removing fetal remains from its own premises and in ending abortion-related services violated the Sherman Act. They alleged that Vital-Med intended to force all abortion clinics out of business and deny women the opportunity to obtain an abortion. The Plaintiff-clinics claimed that their costs increased as a result of Vital-Med's decision to stop providing pathology services and that "[w]omen's health centers whose cost increase [sic] are less able to compete with other facilities offering the same or similar services."

Plaintiffs sought monetary damages and injunctive relief from Vital-Med (Second Amended Complaint, Count I). In

requesting injunctive relief, Plaintiffs effectively asked the District Court to force Vital-Med to resume a business it decided was unprofitable and bothersome.

The District Court granted co-Defendants Joseph Scheidler, Andrew Scholberg, Timothy Murphy and the Pro-Life Action League, Inc., Motion to Dismiss the Second Amended Complaint for failure to state a cause of action (App. B).[2] Vital-Med, having answered the Second Amended Complaint after the Court denied its motion to dismiss, did not join in this motion.

The District Court held that the Sherman Act did not apply to a case "which involves the political opponents, not commercial competitors, and political objectives, not market place goals" (B-8). The District Court also dismissed those counts which alleged RICO violations on the basis that they did not state a cause of action (B-9). The District Court declined to entertain the pendent state law claims after its dismissal of the federal counts, and thus dismissed the entire case (B-17).

The Circuit Court affirmed the District Court's decision. Contrary to Petitioners' assertion that the Circuit Court based its ruling on an "unprecedented social cause" exemption from the Sherman Act, the opinion reveals that the basis for the Circuit Court's ruling was its determination that the focus of the Sherman Act is on matters dealing with "business competition." Quoting this Court's decision in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 n.15, the Circuit Court stated the "act was designed to prevent restraints of trade which had a significant effect on such competition." Applying that standard to the facts

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[2] Appendix page references are made to the appendices contained in the Petition.

before it, the Circuit Court concluded that "plaintiffs have not alleged that the defendants are exercising market power to harm their businesses" (A-19). Further, "[p]laintiffs have failed to make the required showing that the defendants have exerted market control of the supply of abortion services, control of price (beyond raising prices by increasing costs), or discrimination between would-be purchasers" (A-19). The Circuit Court's ruling was properly grounded in considerations of business competition which the Sherman Act was designed to protect. Moreover, the Circuit Court's decision was amply supported by case law. Petitioners' mischaracterization of the Circuit Court's decision is without merit and does not require the granting of a writ of certiorari.

SUMMARY OF ARGUMENT

Only the Sherman Act count of Plaintiffs' Second Amended Complaint is at issue before this Court as against Vital-Med. Count I failed to state an antitrust cause of action against Vital-Med for two reasons.

First, Plaintiffs did not allege any anti-competitive effect of the decision by Vital-Med to discontinue providing abortion-related laboratory services. One member's departure from the market does not alone result in "antitrust injury." Nor did Plaintiffs claim that Vital-Med's alleged complicity in the theft of fetal remains from its own property affected competition in the provision of abortion-related services. Without an allegation of cognizable damage or injury to competition as a whole, Count I was properly dismissed.

Second, Plaintiffs failed to allege that the actions of Vital-Med's co-defendants fell within the ambit of the Sherman Act. Actions taken by Vital-Med's co-defendants without commercial, anti-competitive effects cannot violate that statute.

ARGUMENT

PETITIONERS HAVE FAILED TO SHOW THAT THE SEVENTH CIRCUIT'S OPINION AFFIRMING DISMISSAL OF PETITIONERS' SECOND AMENDED COMPLAINT CONFLICTS WITH ANY DECISION OF THIS COURT OR WITH THE DECISIONS OF ANY CIRCUIT COURT OF APPEALS AND THE PETITION RAISES NO QUESTION WORTHY OF THE GRANTING OF A WRIT OF CERTIORARI.

The decision by the Court of Appeals is firmly grounded in well-established principles governing the application of the Sherman Act and is not inconsistent with any decision of this Court or with the decisions of any court of appeals and the petition raises no question worthy of the granting of a writ of certiorari.

Petitioners' Second Amended Complaint alleged that Vital-Med violated Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1) by participating in stealing fetal remains from its own premises and by discontinuing pathology services (Second Amended Complaint, ¶ 72). Neither of these activities, however, supports an antitrust claim against Vital-Med because Petitioners did not plead any facts to show that those actions had any anti-competitive effect in the clinics' product and geographic markets.

Petitioners failed to plead an antitrust cause of action for three reasons. They did not allege:

(1) that Vital-Med's decision to discontinue performing pathology services injured competition in the pathology laboratory industry which in turn damaged the clinics' business;

(2) that Vital-Med's claimed acquiescence in the theft of its property or its decision to discontinue performing pathology services reduced the number of

facilities performing abortions within the clinics' geographic areas; or

(3) that Vital-Med had the power to affect the relevant market.

The focus of antitrust law is injury to competitive conditions, not injury to a specific competitor. Allegations of "antitrust injury" are a prerequisite to maintaining suit. *Atlantic Richfield Co. v. USA Petroleum Co.*, ____ U.S. ____, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).

A corollary to this rule is that "the Sherman Act does not preclude a party from unilaterally determining the parties with whom it will deal and the terms on which it will transact business." *Zinser v. Rose*, 868 F.2d 938, 940 (7th Cir. 1989) (*quoting, Quality Auto Body, Inc. v. Allstate Ins. Co.*, 660 F.2d 1195, 1205 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982)). *See also, Bunch v. Artec Int'l Corp.*, 559 F. Supp. 961, 967 (S.D.N.Y. 1983) (manufacturer permitted to terminate dealer or distributor unilaterally). The antitrust laws do not guarantee every competitor tenure in the marketplace. *Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 663 (7th Cir. 1982).

At best, Petitioners contended that Vital-Med's conduct had some sort of effect on a clinic in Wisconsin and one in Delaware (Second Amended Complaint, ¶ 83). Their reference to unspecified effects on "similarly-situated women's health centers" is insufficient to state an antitrust claim for those damages. An antitrust plaintiff "must allege nonconclusory facts establishing that there has been injury to the plaintiff's business or property and that the injury to the plaintiff's business or property occurred 'by reason of'

the antitrust violation." *Solinger v. A & M Records, Inc.*, 586 F.2d 1304, 1309 (9th Cir. 1978), *cert. denied sub nom. Motown Record Corp. v. Solinger*, 441 U.S. 908 (1979).

DWHO and SWHO are still in business (Second Amended Complaint, ¶¶ 6-8). They did not allege any loss of business as a result of Vital-Med's conduct. They claimed that their costs increased to cover "the expense of increased security, higher insurance premiums, higher rents, and mounting legal fees, among other things" (Second Amended Complaint, ¶ 87). They did not expressly allege that they have become less competitive, but averred generally that "[w]omen's health centers whose cost increase [sic] are less able to compete with other facilities offering the same or similar services" (Second Amended Complaint, ¶¶ 87, 89).

The clinics did not cite lost profits, or fewer patients. Instead, they claimed that Vital-Med's actions "have increased the cost and threaten to increase the cost, of having an abortion" (Second Amended Complaint, ¶ 87). They contended that those actions "have made it, and threaten to make it, more difficult for women to obtain abortions" (Second Amended Complaint, ¶ 88). They averred that those actions interfered with the clinics' ongoing business relations (Second Amended Complaint, ¶ 90).

It is difficult to see how these claimed effects relate to an injury to competition at large. Claiming "increased costs," "interference" and "difficulties" is one thing; relating them to a weakening of competition is another. Plaintiffs have done nothing to allege a causal link between any injury to the competitive system and their supposed damages and difficulties. Their one-line conclusions of "restrain[ing] interstate trade" and "an anticompetitive effect" do not state an antitrust cause for their claimed losses (Second Amended Complaint, ¶¶ 81-82).

Yet, even if Plaintiffs could tie any monetary losses to Vital-Med's conduct, that would not salvage their claim in the absence of injury to competition as a whole in the relevant market. In *Northeast Women's Center, Inc. v. McMonagle*, 670 F. Supp. 1300 (E.D.Pa. 1987), an abortion clinic filed an antitrust action, alleging that pro-life activists conspired to disrupt its business activities and that the defendants' actions were designed to force it out of business. The complaint sought injunctive relief and monetary damages.

The *McMonagle* court required the clinic to demonstrate that the defendants' acts reduced the number of abortion facilities within the clinic's geographic area. 670 F. Supp. at 1305. The district court held that the clinic could not maintain an antitrust action merely by contending that one competitor in a relevant geographic market lost profits or was eliminated from competition as a result of the defendants' actions. *Id.*, *citing*, *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc.*, 732 F.2d 1403 (9th Cir. 1984).

Plaintiffs' Second Amended Complaint did not allege that Vital-Med's actions reduced the number of facilities performing abortions within the clinics' geographic areas in Delaware and Wisconsin. They contended that all Defendants' actions "have forced, and threatened to force, women's health centers that perform abortions out of business" (Second Amended Complaint, ¶ 86), however, they named no closed clinics. Without allegations of reducing competition in the relevant market for abortion-related services, there can be no antitrust violation.

Because Plaintiffs alleged no "antitrust injury" from any of Vital-Med's actions, their antitrust count against Vital-Med was properly dismissed, aside from the reasons given

by the District Court. As one Circuit stated, "[i]f the failure to prove cognizable damages requires a judgment for the defendant notwithstanding the verdict * * * it follows that a failure to allege cognizable damage compels dismissal of the complaint." *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir. 1981), *cert. denied*, 454 U.S. 893 (1981).

Vital-Med is not a competitor of the Plaintiff-clinics. It performed pathology services; they do not (Second Amended Complaint, ¶¶ 6, 7, 65). Thus, this suit is nothing more than a claim of antitrust violations by a non-competitor without allegations of antitrust injury. One court described such a suit as "destined to fail." *Eastway Constr. Corp. v. New York*, 762 F.2d 243, 254 (2d Cir. 1985). Moreover, even if this Court could infer "antitrust injury" from Plaintiffs' Second Amended Complaint, dismissal was required since Plaintiffs did not allege that competition in the provision of pathology services was injured by Vital-Med's departure from the market.

The concept of injury to competition has spawned the "*per se*" and "rule of reason" lines of analysis to gauge the competitive reasonableness of a practice challenged under Section 1 of the Sherman Act. Vital-Med's discontinuation of abortion-related services could only be a vertical refusal to deal, which is examined under the "rule of reason" analysis. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). Under that analysis, a plaintiff must allege that the defendant's actions had an anti-competitive effect on the relevant geographic and product market in order to state a colorable antitrust claim. *Products Liability Ins. Agency, supra*; *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549 (7th Cir. 1980).

Plaintiffs did not allege that Vital-Med's discontinuation of pathology services for DWHO and SWHO had an anti-competitive effect on the market for those services, since they did not allege that the clinics could not obtain the same services from another source. A seller's refusal to deal with a former buyer does not violate Section 1 of the Sherman Act, even if its products are available to the buyer only at a higher price. *See, e.g., Westman Com. Co. v. Hobart Int'l Inc.*, 796 F.2d 1216 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988); *Determined Productions, Inc. v. R. Dakin & Co.*, 514 F. Supp. 645 (N.D.Cal. 1979), *aff'd without op.*, 649 F.2d 866 (9th Cir. 1981); *Western Wholesale Liquor Co. v. Gibson Wine Co.*, 372 F. Supp. 802 (D.S.D. 1974).

Section 1 does not proscribe refusals to deal absent a showing of a seller's "market power." *Westman*, 796 F.2d at 1229; *Polk Bros., Inc. v. Forest City Ent., Inc.*, 776 F.2d 185 (7th Cir. 1985). Market power is a seller's ability to restrict the availability of goods or services and raise the price for those goods and services above competitive levels. *National Collegiate Athletic Assoc. v. Board of Regents*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984). An antitrust defendant without market power has no burden to justify its allegedly anti-competitive conduct. *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656 (7th Cir. 1987), *cert. denied*, 484 U.S. 877 (1987); *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986), *reh'g denied en banc*, 788 F.2d 1223 (7th Cir. 1986).

Plaintiffs' Second Amended Complaint did not allege any facts to show that Vital-Med had any power to restrict the availability of pathology and disposal services to abortion clinics. They also did not allege that Vital-Med had the power to raise prices above competitive levels. The

fifteen skeletal paragraphs of the antitrust count mention nothing about Vital-Med's market power (Second Amended Complaint, ¶¶ 79-93).

All Petitioners alleged is that they were no longer able to deal with Vital-Med (Second Amended Complaint, ¶ 76). They did not aver that their "difficulties" were produced by a more restrictive market for pathology services. Nor did they claim that Vital-Med's decision resulted in abortion clinic closings or fewer abortions being performed at the Plaintiff-clinics. They failed to state the relevant market for pathology services, or anything about Vital-Med's power within that market.

Petitioners erroneously claim that the Circuit Court's decision conflicts with the Eighth Circuit's decision in *Council of Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920) (Petition at 6). Petitioners contend that the Seventh Circuit's opinion would call for the implicit overruling of numerous decisions of this Court (Petition at 21, 28). Petitioners' claims are misguided and mistakenly based on a mischaracterization of the Seventh Circuit's decision.

The clear basis for the Circuit Court's decision in the instant matter is its finding that the Petitioners failed to allege that the defendants exercised market power to harm Petitioners' businesses (A-19). The Seventh Circuit correctly held that Petitioners failed to make the required showing that the defendants exerted market control of the supply of abortion services, control of price (beyond raising prices by increasing costs), or discrimination between would-be purchasers (A-19).

Petitioners simply ascribe too much to the Circuit Court's treatment of *Council of Defense*. The Circuit Court found the decision in *Council of Defense* not to be controlling in light of this Court's decision in *NAACP v. Claiborne*

Hardware Co., 458 U.S. 886 (1981) (A-19). However, the Circuit Court did not base its ruling on the holding in *Claiborne Hardware* but rather found that that decision shed doubt upon the holding enunciated in *Council of Defense* and accordingly shed doubt upon Petitioners' reliance upon it. Under these circumstances, Petitioners' characterization of the Seventh Circuit's decision as "conflicting" with the Eighth Circuit's decision in *Council of Defense* is extreme and does not mandate granting of a writ of certiorari to the Court of Appeals.

Further doubt is cast upon the weight given by Petitioners to their assertion that the Seventh Circuit's decision directly conflicts with *Council of Defense* when considered in light of Petitioners' failure to address this Court's decision in *Apex Hosiery* upon which the Seventh Circuit strongly relied. In considering the *Apex Hosiery* decision the Circuit Court stated "[t]he Court rejected the union's contention that all labor activities are exempt from Sherman Act, *Id.* at 487, just as we reject defendants' contention that all "protest" or non-commercially oriented activities are exempt because of the First Amendment," (*quoting*, *Apex Hosiery*, 310 U.S. at 487 (A-18). Continuing to quote from *Apex Hosiery* the Circuit Court noted that "[t]he Sherman Act was not enacted . . . to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to monopolize the supply, control its price, or discriminate between its would-be purchasers," (*quoting*, *Apex Hosiery*, 310 U.S. at 512 (A-18). Finally, "[r]estraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence." *Id.* at 513. Thus, to the extent the Seventh Circuit's decision does conflict with the Eighth Circuit's

decision in *Council of Defense*, it is clearly in accordance with this Court's decision in *Apex Hosiery*.

In sum, Petitioners' antitrust count against Vital-Med omitted many of the essential elements of a private antitrust cause of action, most particularly antitrust injury and anti-competitive effect. These omissions are fatal, and warranted the Circuit Court's affirmance of the District Court's dismissal of Count I of the Second Amended Complaint. Accordingly, there are no questions worthy of the granting of a writ of certiorari to the Court of Appeals.

CONCLUSION

The Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals should be denied.

Respectfully submitted,

CHARLES F. REDDEN
MARK D. ROTH
PRETZEL & STOUFFER, CHTD.
One South Wacker Drive
Chicago, Illinois 60606
(312) 346-1973
Attorneys for Respondent,
VITAL-MED LABORATORIES, INC.

Of Counsel:
ROBERT MARC CHEMERS
Counsel of Record
SCOTT O. REED
MARK D. ROTH
ANNE SCHEITLIN JOHNSON
PRETZEL & STOUFFER, CHTD.
One South Wacker Drive
Chicago, Illinois 60606
(312) 346-1973

(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions, et al.,

Petitioners,

v.

JOSEPH SCHEIDLER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

BRIEF OF RESPONDENTS JOHN P. RYAN AND PRO-LIFE DIRECT ACTION LEAGUE, INC. IN OPPOSITION TO THE PETITION FOR CERTIORARI

TIMOTHY BELZ
Suite 1710
7777 Bonhomme
St. Louis, MO 63105
314/863-0200

TIMOTHY C. KLENK
(*Counsel of Record*)
JEROME K. BOWMAN
KRISTIN E. MICHAELS
Suite 3200
69 West Washington Street
Chicago, IL 60602-3069
312/214-4200

Counsel for Respondents
John P. Ryan and Pro-Life
Direct Action League, Inc.

December 23, 1992

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts properly refused to expand the Sherman Act to apply to the totally non-commercial "conspiracy" of pro-life demonstrators alleged in this case.

2. Whether, even if the Sherman Act did apply, the petitioners' antitrust claims were properly dismissed because the petitioners failed to allege any antitrust injury.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The petitioners have accurately listed the parties to this proceeding.

The Pro-Life Direct Action League, Inc. has no parent companies, subsidiaries or affiliates.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

BRIEF OF RESPONDENTS JOHN P. RYAN AND PRO-LIFE DIRECT ACTION LEAGUE, INC. IN OPPOSITION TO THE PETITION FOR CERTIORARI

Respondents John P. Ryan ("Ryan") and the Pro-Life Direct Action League, Inc. ("PDAL") respectfully ask the Court to deny the Petition for Writ of Certiorari (the "Petition").

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit affirming the district court's dismissal of this suit

is reported at 968 F.2d 612 (7th Cir. 1992) and is reproduced in Appendix A to the Petition.

The opinion of the District Court for the Northern District of Illinois dismissing this suit is reported at 765 F.Supp. 937 (N.D. Ill. 1991) and is reproduced in Appendix B to the Petition.

STATEMENT OF JURISDICTION

Petitioners have accurately stated the basis for this Court's jurisdiction over this proceeding.

STATEMENT OF THE CASE

I. Nature Of The Case

The petitioners (sometimes referred to in this brief as the "plaintiffs") seek a declaratory judgment, injunctive relief and treble damages against Ryan and PDAL under Section 1 of the Sherman Act (15 U.S.C. §1) and Section 16 of the Clayton Act (15 U.S.C. §26). Ryan and PDAL are not named as defendants in plaintiffs' RICO and common law counts.

II. The Proceedings And Their Disposition In The Courts Below

This case was initiated in 1986 by the filing of a single-count antitrust complaint. After several amendments to the complaint adding new counts and new defendants, and replacing one plaintiff clinic with another, certain of the respondents (often referred to in this brief as the "defendants") moved to dismiss the plaintiffs' second amended complaint (the "Complaint") (R.331). Their motion was based primarily on the Complaint's failure to state a claim under the antitrust laws and RICO (R.331). District Court Judge James F. Holderman granted that motion and dismissed the action "in its entirety" (R.502).

The plaintiffs subsequently appealed the district court's order dismissing the case (R.517). On June 29, 1992, the Court of Appeals for the Seventh Circuit affirmed the district court's order. Petitioners sought a rehearing *en banc* and the court of appeals denied that request. Petitioners subsequently filed their petition for writ of certiorari with this Court.

III. The Facts[1]

A. Background

Ryan is a Missouri resident who, until 1987, was engaged in a number of pro-life activities, mostly in the St. Louis, Missouri area (R.329, ¶4). PDAL is a Missouri not-for-profit corporation which has also been engaged in pro-life activities (R.21, ¶3). Until 1987, Ryan was executive director of PDAL (R.21, ¶1; R.329, ¶4; R.236, ¶10). He has not been involved as a pro-life activist since then (*Id.*).

Neither PDAL nor Ryan, as its executive director, has been engaged in commerce or owned an interest in any business entity (R.21, ¶¶5 and 6). Nor has either had any commercial relationship with any of the plaintiffs or with any women's health center that provides abortions. Neither has ever provided abortions or gynecological services of any kind (*Id.*, ¶¶6 and 7).

Neither Ryan nor PDAL has been involved in any demonstration, picketing, sit-in or other pro-life activity at, or in the vicinity of, either of the two plaintiff clinics (R.329, Ryan Aff., ¶5 and O'Brien Aff., ¶5). Nor has Ryan or PDAL even been in the vicinity of those clinics or

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[1]Petitioners' Complaint was dismissed by the district court. Accordingly, the well pled allegations contained in it are accepted as true—even though respondents vehemently deny most of those allegations, especially those which allege that respondents engaged in violence of any kind.

planned or taken (or participated in any plan to take) any action of any kind against them (*Id.*).

B. The Complaint

The Complaint contains numerous conclusory allegations about a vague "conspiracy" by "the defendants" to "drive every clinic in the United States, *such as* [the plaintiff clinics], out of business" (R.236, ¶¶26 and 27) (emphasis added). (*See also*, R.236, ¶¶1, 2, 30, 32, 33 and 39-41.) But the petitioners do not allege that either Ryan or PDAL was ever involved in any demonstration, picketing, sit-in or other pro-life activity at, or in the vicinity of, either of the two plaintiff clinics—or that Ryan or PDAL has ever even been in the vicinity of those clinics. Nor do plaintiffs allege that either Ryan or PDAL has ever planned, participated in planning, or taken, any action of any kind with respect to either of the two plaintiff clinics. In fact, plaintiffs' Complaint contains no such allegations against *any defendant* except Scheidler, who on one occasion in 1986, allegedly entered one of the plaintiff clinics (R.236, ¶¶43-46). Plaintiffs do not allege that any other defendant participated in that event.[2]

Petitioners also rely on their "RICO Case Statement" (R.469) to establish the adequacy of their claims.[3] That Statement stated that the conspiracy alleged by the plaintiffs involved "hundreds of thousands of unidentified

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[2]Ryan and PDAL have admitted that they have engaged in sit-ins at *other* clinics. *However, they have denied that they have engaged in violence of any kind* (R.444, ¶2). To the extent that the court of appeals referred to the defendants' activities as "reprehensible" (*see* Petition at p.3 n.1 and p. A-17), it based its conclusion on the plaintiffs' *allegations*, not upon any proven facts.

[3]Even if the plaintiffs could properly rely on their RICO Case Statement to establish their claims against other defendants, that statement cannot be used to support their claims against Ryan and PDAL since neither Ryan nor PDAL is a RICO defendant.

co-conspirators" (R.469, ¶3, p.3), and contained an exhibit which described pro-life activities in which Ryan and PDAL were alleged to have participated (*Id.*, Ex. B). Not one of those activities is alleged to have taken place in the vicinity of, or to have affected, either of the plaintiff abortion clinics.

Petitioners conclude that the activities of "the defendants" have "restrain[ed] interstate trade" and have had "an anticompetitive effect" (R.236, ¶¶81-82). But their Complaint does not define any relevant product or geographic markets in which they (or any other women's health centers) were allegedly less able to compete. Nor do the petitioners allege that Ryan or PDAL engaged in commerce, had any interest in any business entity, or competed with any petitioner. (Petitioners allege only that the "business" of PDAL consists of "disrupting and closing clinics" (R.236, ¶18).)

In fact, petitioners do not allege that Ryan or PDAL ever had *any* commercial relationship with the petitioners or any abortion clinic. Although they did allege that the "defendants and their co-conspirators" established "competing pregnancy testing and counseling facilities..., homes for pregnant women..., and prenatal and delivery services, foster homes and private adoption agencies" (R.236, ¶2), they did not allege that any of those facilities competed with the *plaintiff* clinics. And, although they allege that defendant Terry operated pregnancy and counseling centers in New York and defendant Wojnar operated anti-abortion women's medical clinics in Chicago (R.236, ¶¶11 and 13), they make no such allegations about Ryan, PDAL or any other defendant and they allege no such activities by *any* defendant in Delaware or Wisconsin. Of course, plaintiffs do not allege that Ryan, PDAL or any other defendant has ever provided abortion services.

Likewise, petitioners do not allege in their Complaint that Ryan, PDAL or any other defendant engaged in any pro-life activities for business or commercial gain. Nor do they allege that Ryan, PDAL or any other pro-life defendant used any business or commercial means to accomplish their objectives. They are not alleged to have engaged in any price-fixing, boycott, concerted refusal to deal, territorial restraint or other recognized antitrust violation.

Finally, petitioners do not allege that Ryan, PDAL or any other pro-life defendant had "market power" or the ability to substantially affect the supply of, or demand for, abortion services in any relevant market—or even that respondents participated in the market for abortion services. Nor do they allege that the activities of Ryan or PDAL, or their alleged "co-conspirators," reduced the number of abortion clinics (or the number of abortions performed by abortion clinics) in Wisconsin, Delaware or elsewhere in the United States, or otherwise substantially reduced competition between abortion clinics or between abortion clinics and other providers of abortion services.

REASONS FOR DENYING THE WRIT

I. Petitioners Misstate The Issue And The Facts

A. Petitioners Misstate The Issue Before the Court

Petitioners contend that the issue in this case is "whether the Sherman Act contains an implied exemption for all organizations that claim to be espousing a 'social cause'...." (Petition at p.i.) Later, petitioners phrase the issue in terms of whether "good motives" are a defense under the Sherman Act (Petition at pp. 13 *et seq.*). However phrased, this is not the issue.

Respondents have never argued, and do not argue now, that "good motives" or a "social cause" create an *exemption* from the antitrust laws. The issue is whether the antitrust laws apply here in the first instance, not whether some "exemption" applies. As the district court stated: *The "threshold question is whether the Sherman Act was intended to cover the conduct alleged here." National Organization for Women v. Scheidler*, 765 F.Supp. 937, 939 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992) (Petition at p.B-3) (emphasis added). This is also the issue on which the court of appeals focused.[4]

Petitioners also misstate the issue when they suggest that the "exemption" they claim is espoused by respondents (and the two lower courts) was based on "good motives" or a "social cause." The issue is not just whether the respondents have good motives or a social cause. Rather, it is whether the antitrust laws apply to a conspiracy which is non-commercial *in every respect*. As the court of appeals held in this case:

> The [Supreme] Court explained in *Apex Hosiery*, 310 U.S. [469,] 493 n.15 [1939], that "[t]he history of the Sherman Act as contained in the legislative proceedings is emphatic in its support for the conclusion that 'business competition' was the problem considered and that the act was designed to prevent restraints on trade which had a significant effect on

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[4]Throughout their Petition, petitioners egregiously mischaracterize the decision of the court of appeals. That court did not find any exemption based on good motives. Rather, it examined the legislative history of the Sherman Act and properly concluded that that law was not intended to apply in a non-commercial case such as this. Petitioners' misstatement of the issue is highlighted by their argument that, if respondents do not want to be covered by the antitrust laws, they should go to Congress for a legislative exemption (Petition at p.28). There is, of course, no reason to ask Congress for an exemption from a law which does not apply in the first place.

> such competition." For this reason, we question the appropriateness of the Act's application in this case.

National Organization for Women v. Scheidler, 968 F.2d 612, 617 (7th Cir. 1992), Petition at p. A-8. *See also*, 968 F.2d at 622, Petition at p. A-17 ("The defendants' acts are far beyond those that Congress intended to reach with the Sherman Act").

The Seventh Circuit again emphasized the limits of the antitrust laws when it stated:

> We are convinced by the economic and legislative history of the Sherman Act that it was intended to prevent *business competitors* from making restraining arrangements *for their own economic advantage.* As the [Supreme] Court stated in *Allen Bradley Co. v. Union*, 325 U.S. 797, 811 (1945), "We know that Congress feared the concentrated power of *business organizations* to dominate markets and prices. *It intended to outlaw business monopolies." Defendants are not involved in business, and have no ability to concentrate economic power.*

National Organization for Women v. Scheidler, 968 F.2d at 621, Petition at pp. A-15 to A-16 (emphasis added and footnote omitted).[5]

In phrasing the inquiry incorrectly, petitioners attempt to set up a straw man. Their entire argument, as well as the cases on which they rely, deal with a non-existent is-

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[5]In a curious bit of reasoning, petitioners accuse the court of appeals of "misusing historically unreliable materials [the legislative history] to reach a preordained result." But why would the lower court manipulate history to support a "preordained result" when it is apparent that the court accepted petitioners' allegations and even characterized the respondents' *alleged* conduct as deplorable? Clearly, the court of appeals had no preordained result in mind but was simply convinced by precedent and the Act's legislative history that petitioners' remedies lie under state law, not federal antitrust law.

sue. They completely fail to address the true issue raised by respondents and addressed by both of the courts below. And the law relating to that issue—which holds that the Sherman Act does not apply to a completely non-commercial conspiracy such as the one alleged by petitioners in this case—has never been questioned by this Court or any circuit court of appeals. Thus, the Petition should be denied.

B. Petitioners Also Misstate The Facts, Including Their Own Allegations

In various places in their Petition, petitioners allege that "defendants" operated clinics which competed with the plaintiff clinics. (*See, e.g.*, Petition at pp. 5, 6 and 17.) But the petitioners fail to mention that neither Ryan nor PDAL (nor most of the other defendants) is ever alleged to have participated in any way in those clinics.

Even as to the two or three respondents whom petitioners allege did operate clinics,[6] petitioners radically misstate the facts. For example, they assert that these clinics compete with the plaintiff clinics, but the only clinics they mention in their Complaint are ones operated in Binghampton, New York and Chicago, Illinois (R.236, ¶¶11 and 13). *However, the plaintiff clinics are located in Delaware and Wisconsin* (R.236, ¶¶6 and 7). Further, of course, it is not even suggested that any clinic operated by any respondent provides, or competes in the market for, abortion services.

Similarly, petitioners have alleged a "nation-wide criminal conspiracy of extremists who use unlawful and

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[6]The plaintiffs identify defendants Wojnar and Terry, and possibly Scholberg, as the defendants involved in operating clinics. Petition at pp. 4 and 5. The court of appeals concluded that only Wojnar and Terry are alleged to have operated such clinics. 968 F.2d at pp. 616, 620, Petition at pp. A-4, A-14.

violent means. . ." (Petition at p.3). This conspiracy is alleged to involve "hundreds of thousands of unidentified co-conspirators" (R.469, ¶3, p.3).[7]

Petitioners also consistently rely upon conduct directed at abortion clinics which are not parties to this action. But petitioners never inform the Court that, despite its caption, this suit has never been certified as a class action. Accordingly, most of the petitioners' arguments and "facts" relate not to parties to this suit but to others they have never been authorized to represent.

Similarly, petitioners allege that their "complaint did not in any way implicate lawful speech . . ." (Petition at p.4). This is not true. Petitioners asked the district court to enjoin "the defendants from carrying out a concerted effort to drive women's health centers . . . out of business" (R.236, Count I, Prayer for Relief). Such a "concerted effort," so broadly stated, encompasses picketing, speech, and a host of other protected activities. Further, prosecution of an action based on a complaint of such unprecedented breadth (*e.g.*, a conspiracy of hundreds of thousands) cannot help but have a chilling effect on the First Amendment rights of countless persons.

Petitioners also stretch their own pleadings beyond recognition when they try to paint respondents as commercial actors. As previously discussed, petitioners never alleged that Ryan or PDAL engaged in commerce or had any interest in any commercial entity.[8] Nothing in the Complaint suggests that either Ryan or PDAL had any

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[7]Petitioners' allegation that defendants' conduct was "unlawful" or "illegal" is a red herring, irrelevant to the antitrust issues presented here. *See* page 15 n. 10, *infra*.

[8]The closest plaintiffs come is their assertion that the "business" of PDAL consists of "disrupting and closing clinics" (R.236, ¶18). Obviously, "disrupting and closing clinics" by the methods, and for the purposes, alleged in the Complaint is not a "business."

profit motive for disrupting and closing clinics. In attempting to establish defendants' "economic motive," petitioners point to their RICO Case Statement and a single paragraph in the RICO count of their complaint. But they again seem to forget that *neither Ryan nor PDAL is a RICO defendant*. In any event, petitioners' RICO allegations are largely meaningless even as to those respondents against whom they are asserted. Despite the reckless charges in their Petition that other defendants earned hundreds of thousands of dollars from their pro-life activities, petitioners allege in their pleadings only that certain of the defendant organizations received "donations" (or "income") and paid salaries and benefits to certain of their officers and employees (the individual defendants) (R.236, ¶100 and R.469, pp. 18 and 21-22).

If the receipt of salaries by employees of non-profit organizations or the receipt of donations by those organizations made them commercial entities, there could hardly be such a thing as a non-commercial entity. For example, under plaintiffs' approach, any activity of a charitable organization would be commercially motivated if it provided a reason for donors to make contributions to the organization from which the organization's officers and other employees could be paid. The very fact that petitioners base their position on such tenuous grounds demonstrates their inability to state an antitrust claim.

Petitioners' pleadings, in fact, establish just the opposite of what they argue in their Petition. Their Complaint is replete with allegations demonstrating that the objective of the defendants' pro-life activities was not commercial but to stop abortions. Indeed, the court of appeals recognized that "defendants are not engaged in business." 968 F.2d at 621, Petition at p. A-16. And the plaintiffs do not allege that defendants have conspired to drive all

women's clinics out of business but only *those "which provide abortions."* (*See, e.g.*, R.236, ¶¶1, 18, 32 and 33.)

The district court here noted that "a woman's right to have an abortion is a social or political issue—one of the most complex and contentious in American society today" (Petition at p. B-6). Although these words are not found in the petitioners' Complaint, they jump out from it. For example, petitioners describe NOW as an organization dedicated to protecting the constitutional right of women to reproductive freedom (R.236, ¶5; R.469, p.4) and characterize the defendants as anti-abortion extremists who are intent on depriving American women of those rights (R.236, ¶¶26, 27 and 84-88; R.469, pp. 4 and 5). Indeed, the very vehemence of the petitioner's Complaint, RICO Case Statement and Petition amplifies the accuracy of the district court's statement.

II. The Court Should Deny The Writ Because The Law On the Key Issue Before It Is Well Established—The Antitrust Laws Do Not Apply To A Non-Commercial "Conspiracy" Such As The One Alleged By The Petitioners In This Case

A. Plaintiffs Allege Multiple State Law Torts And Violations Of State And Local Ordinances But No Recognized Violation Of Section 1 Of The Sherman Act

Petitioners' Complaint in this action is devoid of typical antitrust allegations. Indeed, petitioners allege none of the types of activities traditionally thought to violate the Sherman Act. *Nowhere do they allege that the defendants engaged in price fixing, a boycott or other concerted refusal to deal, a territorial restraint or any other type of conduct "normally held violative of the Sherman Act." See Eastern Railroad Presidents Conference v.*

Noerr Motor Freight, Inc., 365 U.S. 127, 136-37, *reh'g. denied*, 365 U.S. 875 (1961).

Indeed, that petitioners have not alleged an antitrust claim at all is apparent from a comparison of their allegations to circumstances in which the Sherman Act was intended to apply. In a typical case alleging violations of Section 1 of the Sherman Act, such as price fixing, it is sellers of a commodity or service who conspire. Here, the persons who are alleged to have conspired are third parties who have no economic relationship to the plaintiffs. In a typical Section 1 case, the conspirators receive some economic benefit from their conspiracy, such as higher prices. Here, the defendants receive no economic benefit from the increased prices plaintiffs allege resulted from the conspiracy. It is the plaintiffs, not the defendants, who benefit from those higher prices. In a typical Section 1 case, the conspiracy results in increased *prices*. In this case, the conspiracy is alleged to have resulted in increased *costs* which had only an indirect effect on prices. In the usual Section 1 case, the defendants are alleged to restrict supply. Here they are alleged to restrict demand. In the normal Section 1 case, the conspiracy is alleged to restrict the terms on which consumers can buy commodities or services. Here, the plaintiffs allege that consumers are discouraged from buying them at all. In the usual Section 1 case, the defendants seek to increase their share of the market. In this case, the defendants have no share of the market, do not wish to gain one, and, in fact, are alleged to be attempting to destroy the entire market for abortion services.

The fact of the matter is that the plaintiffs have not alleged an antitrust conspiracy. Rather, they allege state-law tort and criminal violations such as trespass, vandalism, destruction of property and interference with business relationships (Petition at p.3 n.1) which "bear very little if any resemblance to the combinations normally held vi-

olative of the Sherman Act. . . ." *Noerr*, 365 U.S. at 136-37.[9] In fact, as the district court found, the "essential dissimilarity' between the alleged conduct and the conduct traditionally regulated by antitrust laws is of a greater magnitude in this case than that in *Noerr* itself." 765 F.Supp. at 941, Petition at p. B-8. As stated by the court of appeals: "[I]t is hard to ignore the suspicion that the facts have been forced into an antitrust mold to achieve federal jurisdiction." 968 F.2d at 621, Petition at p. A-16 to A-17 (quoting *Havoco of America Ltd. v. Shell Oil Co.*, 626 F.2d 549, 559 (7th Cir. 1980)).

But federal antitrust law is not to be used to remedy, or "federalize," state law torts or crimes, no matter how pervasive they might be. As this Court has stated:

> The Sherman Act was *not enacted . . . to afford a remedy for wrongs, which are actionable under state law*, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to monopolize the supply, control its price, or discriminate between its would-be purchasers.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 511 (1939) (emphasis added) (quoting *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 471 (1921)). As the Court of Appeals for the Seventh Circuit has stated:

> The legislators who passed the Sherman Act did not make ordinary business torts federal torts for which treble damages could be recovered; no such wholesale displacement of state tort law into the federal courts was contemplated or desired. . . .

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[9] At page 4 of their Petition, petitioners argue that their Complaint "attacked only the independently illegal and tortious conduct of the extremists. . . ." In other words, state law torts and crimes.

Sutliff, Inc. v. Donovan Companies, Inc., 727 F.2d 648, 654 (7th Cir. 1984). *See also Seglin v. Esau*, 769 F.2d 1274, 1280 n.6 (7th Cir. 1985), and *Franklin Music Company v. American Broadcasting Companies, Inc.*, 616 F.2d 528, 556 (3d Cir. 1979) (Sloviter, Circuit Judge, concurring) ("For example, if two disgruntled customers conspire to burn a department store which would, if accomplished, have the effect of destroying its business, it seems improbable that a court would hold that the intent which suffices to support a claim under state tort law is itself also enough to support a claim for violation of Section 1 of the Sherman Act"). In this case, petitioners ask the Court to turn state misdemeanors and violations of city ordinances (*e.g.*, trespassing) into violations of federal law with treble damage penalties.[10]

B. The Legislative History Of The Sherman Act, As Well As Every Supreme Court And Court Of Appeals Decision On Point, Recognize That The Antitrust Laws Do Not Apply In A Non-Commercial Case Such As This

Even before the Sherman Act was passed, it was clear that it would not apply to non-business combinations. During debate on the Act, Senator Sherman pointed out

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[10]Petitioners repeatedly allege that respondents' activities were "unlawful" and "illegal." This is a red herring. If they are referring to violations of the antitrust laws, they are begging the question. But if, as is apparent, they are referring to acts which are otherwise unlawful, such as trespass and vandalism, their allegations are simply irrelevant. *See Apex Hosiery*, 310 U.S. 469, 513 (the Sherman Act "draws no distinction between the restraints effected by violence and those achieved by peaceful ... means"); *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946) ("[i]t is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful"); and *Sitkin Smelting & Refining Co. v. FMC Corporation*, 575 F.2d 440 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978) (conduct not within the scope of the Sherman Act does not become an antitrust violation merely because it is illegal).

that it was meant to apply only to "business combinations," not "voluntary associations." *Parker v. Brown*, 317 U.S. 341, 351 (1943) (citing 21 Cong.Rec. 2562 (1890)). As the Eighth Circuit noted in *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301, 1309 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980) ("*Missouri v. NOW*"), the legislative history of the Act indicates that "it was the competitors in commerce that Senator Sherman had in mind as the concern of his bill" and the Supreme Court has determined that "activities that were meant to be covered are competitive activities by competitors with some self-enhancement motivation. . . ." The court perceived Congress' concern "to be not the elimination of boycotts, but elimination of boycotts used by a competitor against a competitor (or against a supplier, customer, etc.) in the business of competing." *Id.* at 1310.

Indeed, the law is so well settled that there have been very few attempts to apply the antitrust laws to totally non-commercial conspiracies such as the one alleged here. And, even in basically non-commercial cases which (unlike this one) involved some commercial elements, the courts have consistently rejected the application of the antitrust laws.

This Court, for example, has repeatedly affirmed the principle that the Sherman Act does not apply to business combinations with *non-commercial objectives*. *See, e.g., Noerr*, 365 U.S. at 141 (the Sherman Act is "tailored . . . for the business world"); and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959) (the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives").

Of course, many other courts have reached the same conclusion. *See, e.g., Marjorie Webster Junior College,*

Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc., 432 F.2d 650, 654-55 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970) (non-commercial activities of non-profit college accreditation association were outside the scope of the Sherman Act); *Swan v. First Church of Christ, Scientist*, 225 F.2d 745, 751 (9th Cir. 1955) (church authorities' efforts to hinder publication and dissemination of book among its members bears no resemblance to "trade or commerce" under the Sherman Act); *Proctor v. General Conference of Seventh-Day Adventists*, 651 F.Supp. 1505, 1524 (N.D. Ill. 1986) (Sherman Act not applicable to Seventh-Day Adventist Church which was "not involved in 'trade or commerce' in the sense those terms are ordinarily used in commercial profit-making activity"); and *Barr v. National Right to Life Committee*, 1981-2 Trade Cases ¶64,315 (M.D. Fla. 1981).[11]

In other cases, the courts have found that the antitrust laws do not apply to alleged conspiracies with non-commercial objectives even where the defendants were business entities. For example, in *Allied International, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368 (1st Cir. 1981), *aff'd on other grounds*, 456 U.S. 212 (1982), the longshoremen conspired to refuse to load and unload ships engaged in trade with the Soviet Union. Even though the court concluded that the labor law exemption

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[11]The *Barr* court granted a motion to dismiss a complaint alleging a conspiracy of religious organizations, an anti-abortion group, hospitals and physicians aimed at curtailing a physician's ability to provide full abortion services to patients. The court said:

> Because defendants' actions, the purpose of which was to encumber plaintiff's ability to provide full abortion services in the Orlando area, are *inherently non-commercial and prompted by no anti-competitive purpose*, they too do not fall within the reach of the Sherman Act.

Barr, 1981-2 Trade Cases at p. 74,410 (emphasis added).

to the antitrust laws was not available to the defendants, it held that the antitrust laws did not apply to the defendants' actions, which were motivated by non-commercial objectives. *Id.* at 1381. The court said:

> We think this limited refusal to handle goods, undertaken as a political protest by a labor union acting on its own, *and ill-designed as a means of gaining a competitive or commercial advantage for the union or its members,* is not the sort of evil at which the Sherman Act is aimed. The Sherman Act was a product of "the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern." *Apex Hosiery v. Leader*, 310 U.S. 469, 492-93 . . . (1940). *The Supreme Court has said that "the Act is aimed primarily at combinations having commercial objectives* and is applied only to a limited extent to organizations, like labor unions, which normally have other objectives." *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra*, 359 U.S. at 213 n.7.

Id. at 1380-81 (emphasis added).[12]

Courts have similarly held the Sherman Act not to apply in cases involving *non-commercial conduct*. For example, in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), this Court held that the Sherman Act did not apply to employees engaged in a violent sit-down strike in which numerous state law felonies were committed and

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[12] *See also, Council for Employment and Economic Energy Use v. WHDH Corp.*, 580 F.2d 9, 12 (1st Cir. 1978), *cert. denied*, 440 U.S. 945 (1979) (upholding dismissal of a complaint and noting that "the original intent of Congress in enacting the Sherman Act was to suppress and penalize restraints on *commercial competition* in the marketing of goods and services") (emphasis in original).

which shut down a company which produced a large percentage of the nation's hosiery. And, in *Barr*, 1981-2 Trade Cases at p.74,410, the court found the pro-life defendants' conduct to be "inherently non-commercial."

Thus, as the cases discussed above demonstrate, the courts have held the Sherman Act not to apply where the *defendants* were non-commercial, where the defendants had no commercial *relationship* with the plaintiffs, where the defendants' *motivation* was non-commercial, and where the defendants' *conduct* was non-commercial. In this case, the defendants fall into all of these categories.

C. The Cases Relied Upon By Petitioners Do Not Support The Applicability Of The Antitrust Laws In This Case

The petitioners direct their entire antitrust argument at their own straw man (their purported "social cause" or "good motives" exemption to the Sherman Act). They thus fail to discuss whether the antitrust laws apply to a totally non-commercial conspiracy such as is alleged in this case. The reason is clear: the antitrust laws do not apply. And none of the Supreme Court or court of appeals cases cited by petitioners hold to the contrary.

Petitioners rely, for example, on two Supreme Court decisions, *Allied Tube and Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) and *F.T.C. v. Superior Court Trial Lawyers Ass'n* ("*D.C. Lawyers*"), 493 U.S. 411 (1990), both of which involved commercial activities. In *Allied Tube*, manufacturers of steel electrical tubing packed a trade association meeting so that the association would not approve the use of plastic electrical tubing as a substitute for their product. The Court recognized that "*the antitrust laws should not regulate political activities simply because those activities have a commercial impact*" but found that the conduct at issue in that case could "*more aptly be*

characterized as commercial activity with a political impact." *Allied Tube*, 486 U.S. at 507 (emphasis added).

D.C. Lawyers also involved commercial activity—a conspiracy among lawyers to fix (raise) the price of their services which nearly brought the District of Columbia criminal justice system to a halt until the lawyers received the higher compensation they demanded. The Supreme Court understandably characterized this as "a naked restraint of price and output in violation of the antitrust laws." *D.C. Lawyers*, 493 U.S. at 423.[13]

Petitioners' reliance on *National Society of Professional Engineers v. United States*, 435 U.S. 679, 693 (1978) is also unfounded. In that case, the Court explicitly found that the defendant, which was comprised of competing engineers, had an anticompetitive purpose and therefore found their commercial conduct (prohibition of competitive bidding) to be violative of the antitrust laws. And *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 (D.C. Cir. 1984), involved an agreement among competitors (dentists) to exclude (boycott) a competitor (another dentist) from full membership in their association. Thus, again, commercial competitors used an economic tool to achieve their purposes.

Likewise, petitioners' reliance on other cases involving organizations (even not-for-profit organizations) which were comprised of commercial actors only highlights the many commercial aspects present in those cases, but missing here. *See, e.g., National Collegiate Athletic Association v. Board of Regents*, 468 U.S. 85 (1984) (NCAA

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[13]The *D.C. Lawyers* Court distinguished *NAACP v. Claiborne Hardware Company*, 458 U.S. 886, *reh'g denied*, 459 U.S. 898 (1982), noting that *Claiborne* "is not applicable to a boycott conducted by *business competitors* who '*stand to profit financially*'" and that the *Claiborne* boycotters sought "no special advantage for themselves." *D.C. Lawyers*, 439 U.S. at 427 (emphasis added).

restricted the televising of college football games of its member Universities); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, *reh'g denied*, 423 U.S. 886 (1975) (state bar minimum fee schedule prevented price competition among attorneys); *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) (organization of dentists which required its members to withhold x-rays from dental insurers in connection with evaluating patients' claims for benefits prevented competition among dentists with respect to insurance policies); *Wilk v. American Medical Association*, 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 467 U.S. 1260 (1984) (defendant association of medical doctors implemented a group boycott against chiropractors).

Petitioners also rely upon *Costello Publishing Co. v. Rotelle*, 670 F.2d 1035 (D.C. Cir. 1981). But the *Rotelle* court noted in the very first sentence of its opinion that the case "involve[d] a dispute between lay and clerical members of the Roman Catholic Church, *who also share a commercial relationship*," *Id.* at 1038 (emphasis added), and determined that the church had a "financial interest" in the transactions at issue. *Id.* at 1047. In any event, contrary to plaintiffs' suggestion, the *Rotelle* court, which discussed the antitrust laws only in *dicta*, never ruled that the defendants' conduct was subject to antitrust regulation. *Id.* at 1048.

Petitioners attempt to distinguish *Missouri v. NOW* by relying on dicta in a footnote in that case which states, gratuitously and only for the sake of illustration, that "[t]he Sherman Act *may* apply *in some situations* to noncommercial and non-economic boycotts." *Missouri v. NOW*, 620 F.2d at 1315 n.16 (emphasis added) (Petition at p.19). However, the court explicitly acknowledged that "[o]ther courts have been more generous and have equated noncommercial activities with a political right to petition the government." *Id.* It concluded that it was

"not necessary, under the facts of our case, for our ruling to be so broad." *Id.* Furthermore, the court did not state that it *would* apply the Sherman Act to such a boycott and the entirety of its opinion clearly suggests that it would not.

Finally, the old Eighth Circuit case of *Council on Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920), on which petitioners rely in order to create an alleged conflict between the circuits, gains petitioners nothing. That case involved commercial means (a boycott) employed by persons who were commercially related (as purchasers of magazines) to the "victims" of the boycott (the publishers of the magazines). None of those factors is present here.

In short, none of the Supreme Court or court of appeals cases on which plaintiffs rely found the antitrust laws to apply to a totally non-commercial case such as this one, in which non-profit defendants with no business relationship with plaintiffs engaged in non-commercial activities for non-business purposes using no economic tool to achieve their ends.

In fact, of the many cases cited in petitioners' brief, only one district court decision, *Northeast Women's Center, Inc. v. McMonagle*, 624 F.Supp. 736 (E.D. Pa. 1985), even arguably supports their position. But that decision is contrary to every other case on point and is simply wrong.

As they did in the court below, petitioners fail to mention the subsequent history of the *McMonagle* case or inform the Court that the *McMonagle* court subsequently expressed significant reservations about its own decision. In *Northeast Women's Center, Inc. v. McMonagle*, 670 F.Supp. 1300 (E.D. Pa. 1987), *aff'd in part, rev'd in part*, 868 F.2d 1342 (3d Cir. 1989), that court directed a verdict against the plaintiff abortion clinic on the antitrust issue.

Its comments about its earlier decision (the decision on which petitioners in this case rely) are instructive. It said:

> *The plaintiff in this case sought to make new law,* pursuing an antitrust recovery *through an unorthodox application of the Sherman Antitrust Act. Due to the apparent complexity of the facts and the imprecision in the complaint, the court allowed the plaintiff the benefit of the doubt* and permitted the Center to proceed with its proof. However, the mere fact that the plaintiff attempts a novel approach does not afford it special treatment under the antitrust laws.

Id. at 1305 (emphasis added).

Both the district court and the court of appeals in this case avoided the same error by refusing to expand the antitrust laws in such a "new" and "unorthodox" way. In fact, the *McMonagle* court's comments suggest that, were it to decide the case over again, it would do the same, dismissing the case at the start rather than directing a verdict at the end of the plaintiff's case.

D. NOW Itself Has Recognized That This Sort Of Attempt To Expand The Antitrust Law Does Not Merit This Court's Attention

Although petitioners now urge this Court to issue a writ of certiorari, when the shoe was on the other foot NOW recognized that the granting of certiorari in such a case would be improvident.

In *Missouri v. NOW*, the State of Missouri sued NOW, claiming that it had conspired with other organizations to boycott convention facilities in states which refused to approve the Equal Rights Amendment. Both the district court and the court of appeals held that the antitrust laws did not apply. Missouri petitioned for cer-

tiorari and NOW opposed that petition, arguing that the antitrust laws were not intended to be applied to "noncommercial organizations" such as NOW and its co-conspirators, none of which "[sought] any economic gain" and none of which "were . . . in competition" with the plaintiff. NOW said:

> . . . So far as we are aware, Missouri's lawsuit [and two related cases] . . . represent the first and it is hoped the last time in the 90-year history of the Sherman Act that anyone has attempted to use that law as a tool to thwart the concerted political activities of civil rights groups. If similar lawsuits are attempted in the future, the lower courts are likely to recognize them for what they are and dispose of them without the need for any further guidance of this Court.

NOW's Brief in Opposition to Certiorari at p.5.

The Seventh Circuit and the district court here did exactly what NOW predicted. They each recognized a baseless attempt to expand the antitrust laws for what it was and disposed of it.

In fact, NOW recognized in the *Missouri v. NOW* case that this Court has repeatedly construed the Sherman Act to apply only to "commercial activities," "competitive business enterprises," "business competition," "combinations of business and capital organized to suppress commercial competition," "concerted refusals by traders to deal with other traders" and "combinations having commercial objectives" (NOW's Brief in Opposition to Certiorari at p.7). Indeed, the "fundamental error" of Missouri in that case, NOW argued (NOW's Brief in Opposition to Certiorari at p.11), was:

> its attempt to apply the commercial rules of the free market system to the political arena. In the com-

> mercial marketplace, concerted action among businesses is suspect in view of the free enterprise goals of the antitrust laws. Individual businesses are supposed to compete, not collaborate. In the political arena, the opposite attitude prevails.

NOW's arguments in *Missouri v. NOW* are well taken and this Court denied certiorari in that case. The law has not changed since NOW was on the other side of the question. Certiorari was not granted when NOW opposed it in that case and it should not be granted when NOW petitions for it in this case.

E. The Expansion Of The Sherman Act Urged By Petitioners Would Have Absurd Results

As mentioned above (pp. 19-20), petitioners argue that all that is required for an antitrust violation is a conspiracy and economic *impact* (which, of course, is included in the requirement of Section 4 of the Clayton Act (15 U.S.C. §15) that there be an "injury to business or property" in any event). But this Court has already rejected that argument. As it stated in *Allied Tube*: "*[T]he antitrust laws should not regulate political activities simply because those activities have a commercial impact*." 486 U.S. at 507 (emphasis added).

In any event, such a rule would have absurd results. Under that rule, the antitrust laws would apply to the NAACP, Operation PUSH, NOW, migrant farmers and numerous churches, colleges, universities and other organizations and individuals which have been involved in boycotts of such products as cosmetics, television stations, Florida citrus products, lettuce, grapes, slacks, textiles and Russian vodka, as well as to cases in which institutions have agreed to sell their investments in companies doing business in South Africa or individuals have agreed not to patronize convenience stores which sell pornography.

In fact, whereas the present case involves non-commercial defendants with no commercial relationship with plaintiffs who used non-commercial means to accomplish their non-commercial objectives, in these other situations the parties (which were generally related as customers, investors, purchasers, etc.) engaged in economic boycotts and other concerted economic activities to accomplish their desired results. *See, e.g., Missouri v. NOW*, 620 F.2d at 1302 (antitrust laws not applicable to NOW's boycott of state convention facilities even though it was "economically tooled"). Indeed, petitioners themselves appear to recognize that the logical consequence of their novel argument would be to force the federal courts to deal with a host of non-traditional antitrust cases involving groups such as Earth First! and those organizations listed above including, paradoxically, NOW itself.

Petitioners also fail to address other consequences of their position. Focusing on their "good motives" and "social purposes" straw men, the petitioners purport to be concerned about turning federal trials into circuses. But their suggested expansion of the antitrust laws to cover completely non-commercial events would transform every federal district court into a pan-state tribunal by federalizing the tort and criminal laws of all 50 states and the ordinances of thousands of cities, towns, counties and villages. In addition to requiring each federal court to devote its scarce resources to issues of state and local law, petitioners (who have alleged a conspiracy involving hundreds of thousands of co-conspirators) demand an approach which would also expand exponentially the number of potential federal defendants.

Petitioners' approach is thus both unsupported by the law and unworkable in practice. The Court should deny their Petition.

III. The Court Should Deny The Petition Because, Even If The Antitrust Laws Applied To This Case, Petitioners Do Not Allege Any Antitrust Injury

As this Court held in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), an antitrust plaintiff "must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Id.* at 489 (emphasis in original). This standard must be met even by plaintiffs, such as those in this case, who seek injunctive relief under Section 16 of the Clayton Act. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986).

Antitrust injury is injury to competition. It is well established that "[t]he the antitrust laws ... were enacted for 'the protection of *competition, not competitors*.'" *Brunswick*, 429 U.S. at 488 (emphasis in original). Since petitioners have not alleged a *per se* violation,[14] it is also well established that the injury to competition must be *significant*; a plaintiff can only prevail if it can show that an alleged combination or conspiracy "results in a substantial foreclosure of competition in ... a relevant market." *Seglin v. Esau*, 769 F.2d 1274, 1282 n.9 (7th Cir. 1985); *see also, Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-28 (1961); *Phil Tolkan Datsun, Inc. v. Greater Milw. Datsun Dealer's Advertising Ass'n*, 672 F.2d 1280, 1289 (7th Cir. 1982) (plaintiff "failed to identify any *clear or significant* anticompetitive effects" (emphasis added)).

In this case, petitioners have not even alleged the existence of relevant geographic or product markets, much

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[14]It goes without saying that, if petitioners even come close to alleging any violation of the Sherman Act, it would not be a *per se* violation. The *per se* rule "is not employed until after considerable experience with the type of challenged restraint." *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19 n.33 (1979).

less the substantial foreclosure of competition in such markets. Nowhere in their Complaint do petitioners allege that the number of abortion providers in any geographic area has been reduced or even that fewer abortions are being performed in any such area.

In any event, the first thing a plaintiff must do to show injury to competition in a rule of reason case is establish that the defendants had significant market power. But petitioners here have not alleged that the defendants possessed such market power.

In *Sutliff, Inc.*, 727 F.2d at 655, the court affirmed the dismissal of a complaint noting that it alleged only the crippling or destruction of *competitors* in the market: "The complaint alleges no competitive injury in the antitrust sense; defines no market; refers to no market-wide anticompetitive effects, actual or probable." The same is true in this case.[15]

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[15] *See also Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n*, 672 F.2d 1280, 1288 (7th Cir. 1982):

> plaintiff's allegations in the instant case, even fortified by all reasonable inferences that can be drawn from them, do not establish the sort of anticompetitive injury that the antitrust laws are designed to remedy. As this court recently stated:
>
> > It is not the unfair means which may have been employed by the defendant that fall within the purview of the Sherman Act. Rather, the *sole question is whether those means lessened competition*. As noted above, unfair competition is still competition, and will be actionable under the antitrust laws generally *only where a defendant with substantial market power* uses the unfair means to increase its share of the market by eliminating a competitor, thereby creating the risk of monopoly.
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> *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 558 (7th Cir. 1980).

Id. at 1288 (emphasis added). *See also Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc.*, 784 F.2d 1325, 1334-35, *reh'g denied, en banc*, 788 F.2d 1223 (7th Cir. 1986); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982).

Petitioners try to avoid the market power issue (as well as most other issues relating to their insufficient allegations), by arguing that economic impact *by itself* is sufficient to establish an antitrust violation. But, as discussed above (*see* pp. 19-20 and 25, *supra*), this Court has already rejected that argument. Indeed, a contrary ruling would transform virtually all joint conduct which has some economic impact into a violation of the antitrust laws. But that is simply not a reasonable interpretation of those laws or this Court's holdings.

Because petitioners do not even come close to alleging antitrust injury, the decisions of the lower courts were correct and this Court should deny their Petition.

CONCLUSION

For all of the foregoing reasons, respondents John P. Ryan and Pro-Life Direct Action League, Inc. respectfully ask the Court to deny the Petition for Writ of Certiorari, at least insofar as it relates to the petitioners' antitrust claims.

Respectfully submitted,

TIMOTHY BELZ
Suite 1710
7777 Bonhomme
St. Louis, MO 63105
314/863-0200

TIMOTHY C. KLENK
(*Counsel of Record*)
JEROME K. BOWMAN
KRISTIN E. MICHAELS
Suite 3200
69 West Washington Street
Chicago, IL 60602-3069
312/214-4200

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No. 92-780

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Petitioners,

v.

JOSEPH SCHEIDLER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS RANDALL A. TERRY, PROJECT LIFE, AND OPERATION RESCUE

WALTER M. WEBER
(Counsel of Record)
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, D.C. 20007
(202) 337-2273

VINCENT P. MCCARTHY
8 South Main Street
New Milford, CT 06776
(203) 355-0923

LAWRENCE M. GAVIN
BELL, BOYD & LLOYD
Three First National Plaza
Suite 3000
70 West Madison Street
Chicago, IL 60602
(312) 372-1121

Attorneys for Respondents Randall A. Terry, Project Life, and Operation Rescue

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Whether the federal RICO statute, 18 U.S.C. § 1962 (c) and (d), applies to anti-abortion activities undertaken with a complete absence of any economic purpose?

2. Whether anti-abortion "rescues" and protest activities constitute "extortion" under the Hobbs Act, 18 U.S.C. § 1951?

3. Whether the court of appeals correctly affirmed the dismissal of petitioners' antitrust claim? (*See* Brief of Respondents John P. Ryan and Pro-Life Direct Action League, Inc. in Opposition, and Brief in Opposition of Respondents Joseph Scheidler, et al., for statement of the specific issues presented with respect to petitioners' antitrust claims.)

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BRIEF IN OPPOSITION OF RESPONDENTS RANDALL A. TERRY, PROJECT LIFE, AND OPERATION RESCUE

INTRODUCTION

Petitioners initiated this action for declaratory and injunctive relief and damages by invoking federal antitrust law (the Clayton Act, 15 U.S.C. § 26, and the Sherman Antitrust Act, 15 U.S.C. § 1), the Racketeer Influenced and Corrupt Organizations (RICO) Act (18 U.S.C. §§ 1962(c) and (d)),[1] and pendent state law.[2]

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[1] Petitioners initially sought relief under 18 U.S.C. § 1962(a) as well. The courts below rejected this claim, and petitioners have not sought review of those rulings in this Court.

[2] Petitioners did not allege any pendent state law claims against respondents Randall A. Terry, Project Life, or Operation Rescue. The state law claims alleged against other respondents are "tortious interference with prospective economic advantage" (Count V), "tortious interference with existing business relationship" (Count

Petitioners are the National Organization for Women, Inc., an advocacy organization opposed to any legal restrictions on human abortion, and two abortion businesses. Respondents are various individuals and organizations opposed to abortion, and a corporation that provides pathology testing services (Vital-Med Laboratories, Inc.). Petitioners allege that some of the respondents have conspired to close down abortion businesses[1] by unlawful conduct that amounts to violations of federal antitrust and racketeering laws.

Petitioners' lawsuit rests at its core on several erroneous propositions:

—that pro-life "rescue" sit-ins and protest activities constitute federal criminal extortion;

—that a series of such sit-ins amount to a violation of the federal racketeering statute; and,

—that concerted anti-abortion efforts, because aimed at closing abortion *businesses*, amount to a federal antitrust violation.

After nearly five years of discovery and repeated amendment of its complaint, petitioners remained unable to plead a valid cause of action under the governing federal statutes. The court of appeals correctly affirmed the judgment of the district court dismissing the petitioners' lawsuit. This Court should deny certiorari.

STATEMENT OF CASE

1. *Statement of Facts*

The district court dismissed the petitioners' complaint. The record on appeal, then, consists of all facts properly pleaded *in the complaint*.[3]

VI), and (against respondent Vital-Med) "breach of duty of confidentiality" (Count VII).

[3] Petitioners' recitation of the facts improperly includes numerous allegations from the RICO Case Statement that are not present

Petitioner National Organization for Women, Inc. (NOW) is an organization dedicated, *inter alia*, to preserving access to abortion. Second Amended Complaint (2d Am'd Cplt.) at 3-4, ¶ 5. Petitioners Delaware Women's Health Organization (DWHO) and Summit Women's Health Organization, Inc. (Summit) are commercial abortion businesses. *Id.* at 4-5, ¶¶ 6-8; *see also* Pet. at 6 (describing abortion businesses as "commercial establishments").

Respondents (aside from Vital-Med Laboratories, Inc.) consist of individuals and organizations, 2d Am'd Cplt. at 5-8, ¶¶ 9-15, 17-20, sharing a common goal of shutting down all abortion businesses in the United States, *id.* at 10, ¶ 26. These respondents are leaders and participants in the "activist anti-abortion movement." *Id.* at 17, ¶ 52; *id.* at 5 ¶ 9 (respondent Scheidler is "the director of defendant Pro-Life Action League, Inc."); *id.* at 5, ¶ 10 (respondent Ryan was "the director of defendant Pro-Life Direct Action League, Inc."); *id.* at 5, ¶ 11 (respondent Terry is "the national organizer of Operation Rescue"). Respondents have agreed to "drive . . . out of business" every abortion business in the country. *Id.* at 10, ¶ 26.

The methods these various respondents and other pro-life individuals employ to shut down abortion businesses include: distribution of a book "outlining methods intended to be used to interfere with and stop" abortion

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in the second amended complaint. In particular, petitioners recite a veritable nationwide laundry list of offenses that apparently includes every unlawful anti-abortion act known to petitioners. Pet. at 3 n.1. Petitioners' Second Amended Complaint (2d Am'd Cplt.), by contrast, lists only certain very specific incidents as the basis for petitioners' RICO claim. 2d Am'd Cplt. at 31-36, ¶¶ 98a-l. *See infra* pp. 15-17 (chart categorizing alleged predicate acts).

A RICO Case Statement may explain or focus allegations in a complaint; it cannot, however, substitute for an amended complaint under Rule 15(a), Fed. R. Civ. P., or otherwise make up for material deficiencies or omissions by adding to the factual allegations.

businesses from operating, *id.* at 10, ¶ 28 (Scheidler); training and encouraging other persons to use these techniques to close abortion businesses, *e.g.*, *id.* at 11, ¶¶ 29 (Scheidler), 33 (Ryan), 35 (Terry); organizing or participating in blockades and trespassing at abortion businesses, *e.g.*, *id.* at 20-21, ¶¶ 59-63 (various respondents and thousands of other unnamed participants); stealing fetal remains from respondent Vital-Med Laboratories, Inc., and then arranging "highly-publicized" funeral services and burials for these remains, *id.* at 22-25, ¶¶ 64-74 (Scheidler, Scholberg, Murphy, Migliorino, Wojnar, PLAL and other non-defendant participants);[4] damaging or destroying abortion business property (surgical supplies), *id.* at 14, ¶ 42 (non-defendant Joan Andrews); picketing, *id.* at 15-16, ¶¶ 48-50 (Scheidler and Ryan); and pressuring a landlord not to lease space to petitioner Summit, *id.* at 26, ¶¶ 77-78 (Migliorino).

Petitioners allege that one of the purposes of respondents' activities is to create a "threatening and intimidating atmosphere" at abortion businesses. *E.g.*, *id.* at 13, ¶ 39; *id.* at 19, ¶ 56.

Petitioners further allege that respondents receive income in the form of "contributions . . . in support" of their acts designed to shut down abortion businesses, *id.* at 37, ¶ 100, and that certain individual respondents receive salaries and benefits for their pro-life work, *id.*

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[4] Respondent Scheidler announced publicly in 1988 that the remains were "individually packaged and labelled . . . with the names of the mothers, doctors, dates and places" of the abortions. *Id.* at 24, ¶ 70. While this *fact* in itself "presented an obvious threat," i.e., possibility, that the mothers' names could be made public, *id.* at 25, ¶ 75, petitioners have not alleged that any of the respondents have revealed or "threatened" to reveal this information. Therefore petitioners' *legal* assertion that respondents "threatened to disclose confidential information about previous patients," *id.* at 35, 36, ¶¶ 98(j), 98(l) (Count II) (alleged predicate acts), finds no support in petitioners' *factual* allegations.

Petitioners have *not* alleged that respondents have received any income other than donations from their pro-life supporters (and salaries and benefits derived from these donations). Petitioners have *not* alleged that respondents have demanded, requested, or even suggested that petitioners or any other abortion businesses, staff, or clientele turn over money or other property either to respondents or to any other persons or organizations. Furthermore, petitioners have *not* alleged that any of the respondents have any financial or economic incentive for shutting down abortion businesses. Nor have petitioners alleged that respondents have any motivation for their actions other than a genuine, deeply held desire to stop the killing of unborn children by abortion.

2. *Course of Proceedings*

Petitioners filed their original complaint on October 17, 1986. Petitioners subsequently filed, with leave of court, an amended complaint (on February 2, 1989) and a second amended complaint (on September 22, 1989). On March 18, 1991, petitioners submitted a RICO Case Statement in response to an order of the district court.

On May 28, 1991, the district court granted the motion of respondents Joseph Scheidler and others to dismiss the second amended complaint. *National Organization for Women v. Scheidler*, 765 F. Supp. 937 (N.D. Ill. 1991). The district court held that petitioners failed to state a claim, under the federal antitrust and racketeering laws, upon which relief could be granted. The district court accordingly declined to exercise pendent jurisdiction over the remaining state claims, and dismissed the case in its entirety.

The court of appeals affirmed the dismissal of petitioners' lawsuit. *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), and subsequently denied rehearing and rehearing en banc, Pet. App. G-1.

REASONS FOR DENYING THE WRIT

This brief focuses on the RICO claims at issue on appeal. Respondents Randall A. Terry, Project Life, and Operation Rescue adopt the arguments of respondents John P. Ryan and Pro-Life Direct Action League, Inc., and of Joseph Scheidler, et al., with respect to petitioners' antitrust claims. Petitioners have not alleged any pendent state claims against respondents Terry, Project Life, or Operation Rescue.

There are four main reasons for this Court to deny review of petitioners' RICO claims:

1. This case, because of petitioners' overblown and ultimately paranoid theory of litigation, does not present a suitable vehicle for the resolution of the question petitioners have posed.
2. There is no conflict in the circuits.
3. Review is unnecessary for the simple reason that the court below correctly resolved the question petitioners have posed.
4. Finally, resolution of the question petitioners have posed is not necessary to the disposition of this case, as a ready alternative ground exists for rejecting petitioners' RICO claims.

I. PETITIONERS' UNSOUND AND SURREAL THEORY OF THE CASE DOES NOT MERIT REVIEW.

To state that the theory of petitioners' case borders on the absurd is to understate the situation. In essence, petitioners argue that the entire activist pro-life movement represents one huge, illegal conspiracy stretching across the country. *See* Pet. at 3, n.1; 2d Am'd Cplt. at ¶¶ 26-27, 49, 60-63.

Respondent Terry served interrogatories on petitioners seeking, *inter alia*, the names of persons having knowledge of the facts of the alleged antitrust and racketeering

conspiracies. In response, petitioners submitted a 68-page single-spaced list of names of "Persons Who May Have Knowledge of the Facts About Which the Interrogatories Inquire or Which Are Contained in Plaintiff's [sic] Answers Thereto," Ex. B to Plaintiffs' Responses to Terry's First Interrogatories to All Plaintiffs (July 16, 1990). (Excerpts of this document are included in the appendix to this brief.) Scattered among the hundreds and hundreds of names were the following:

> Blackmun, Harry
> Kennedy, Hon. Anthony
> Marshall, Hon. Thurgood
> O'Connor, Justice Sandra Day
> Powell, Hon. Lewis
> Rehnquist, Hon. William
> Scalia, Justice Antonin
> Stevens, Hon. John Paul
> White, Justice Byron

See Appendix. Presumably petitioners' assertions, if taken seriously, would require recusal of those Justices listed above who are currently Members of the Court. *See* 28 U.S.C. § 455(b)(1) (requiring disqualification of any justice who has "personal knowledge of disputed evidentiary facts concerning the proceeding").

The Justices whom petitioners identify as potential factual witnesses in this case enjoy diverse and illustrious company: also included on petitioners' list were various ministers (including "Kennedy, D. James Ph.D."), Roman Catholic bishops and cardinals, elected officials (including "Bond, Gov. Kit," "Bradley, Mayor Tom," "Dole, Sen. Bob," "Edwards, Rep. Don," "Helms, Sen. Jesse," "Kennedy, Ted," "O'Neill, Tip," and "Packwood, Sen. Bob"), judges, attorneys (including "Benshoof, Janet," "Bopp, Jame [sic]," and "Susman, Frank"), writers (including "Chapman, Stephen," and "Will, George F."), abortionists, and a huge miscellany of other individuals, from "Terry, Randy," to "Abzug, Bella," and from "Robertson,

The Rev. Pat" to "Tribe, Laurence." In petitioners' distorted, paranoid version of reality, the gigantic alleged conspiracy which petitioners face is apparently so huge as to be virtually common knowledge.

These outlandish delusions cannot be taken seriously. Nor do these fantasies merit the time of this Court. The judges sitting on the courts below have unanimously voted to reject petitioners' federal claims. There is no reason for this Court to resurrect this legal monstrosity.

II. THERE IS NO CONFLICT IN THE CIRCUITS.

Petitioners portray the Seventh Circuit's decision in this case as creating a conflict with the Third Circuit, and an "inconsistency" with the Second and Eighth Circuits, over the question whether RICO applies when the defendants' activities involve neither economic crimes nor economic goals. A closer look at the authorities upon which petitioners rely, however, reveals that this "conflict" is nonexistent.

The circuits that have actually addressed the relevant issue—the Second and Eighth—are in harmony with the Seventh Circuit. First, in *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983), the Second Circuit held that RICO does not apply unless the defendants have at least some financial motivation—i.e., the defendants either engage in economic crimes (e.g., larceny) or pursue economic goals (i.e., seek revenue from their racketeering), *id.* at 58-65. Subsequent cases in the Second Circuit clarified that an economic goal need not be the sole or even predominant motive of the racketeering activity, *United States v. Bagaric*, 706 F.2d 42, 53, 55 (2d Cir.), *cert. denied*, 464 U.S. 840, 917 (1983), and that classic economic crimes like robbery fall within the RICO statute regardless of the defendants' ultimate noneconomic "revolutionary" purpose, *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985). But both

Bagaric and *Ferguson* applied the RICO statute as construed in *Ivic*; neither decision purported to read the economic purpose element out of the RICO statute.

The Eighth Circuit, meanwhile, has explicity concurred in the *Ivic* court's interpretation of RICO. *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988) ("For purposes of RICO, an enterprise must be directed toward an economic goal") (citing *Ivic* and an earlier Eighth Circuit opinion).[5]

Petitioners' failure even to mention either *Flynn* or *Ivic* in their petition to this Court is indefensible.

Petitioners' supposed conflict, then, reduces to the isolated Third Circuit ruling in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989). But *McMonagle* merely held that *under the Hobbs Act* (prohibiting extortion) a defend-

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[5] Petitioners cite two pre-*Flynn* decisions which are irrelevant to the issue of economic purpose. In *United States v. Clark*, 646 F.2d 1259 (8th Cir. 1981), the court held that RICO applies to governmental bodies and added, in passing, that a RICO enterprise need not be "units of *economic* organization"—i.e., "organizations or structures which *exist* for the purpose of maintaining operations directed toward an economic goal." *Id.* at 1265 n.11 (second emphasis added; internal quotation marks and citations omitted). But this is no more than to say that the *raison d'etre* of an enterprise need not be to make money—a proposition wholly consistent with *Ivic* and *Bagaric*. The RICO statute requires only *some* economic purpose, as the Eighth Circuit subsequently reaffirmed in *Flynn*.

Petitioners' other Eighth Circuit case, *United States v. Ellison*, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986), simply held that predicate acts of arson "were related to the affairs of the enterprise" (a white supremacist group) even though those acts provided "no direct financial benefit" to the enterprise. 793 F.2d at 950. The issue in *Ellison* was *not* the existence of at least *some* mercenary motive: the court had already observed that the supremacist group was involved in theft "intended to produce operating funds," *id.* at 945. The issue in *Ellison*, then, was only the "relatedness" of the predicate acts to the RICO enterprise, an issue inapposite to the case at bar.

ant need not receive a financial benefit from the alleged extortionate conduct (petitioners themselves described the holding of *McMonagle* in these terms in the court below, *see* Plaintiffs-Appellants' Brief at 37-38) and that the property rights extorted may be intangible. 868 F.2d at 1349-50. As the district court correctly recognized in the case at bar, 765 F. Supp. at 942-43, *McMonagle* simply did not address the question of an economic requirement for the "enterprise" element of RICO. Indeed, *McMonagle* did not even cite, much less discuss, the Second Circuit cases of *Ivic*, *Bagaric*, and *Ferguson*, or the Eighth Circuit's *Flynn*.

In sum, the Second, Seventh, and Eighth Circuits are all in agreement that the RICO statute requires some economic purpose. The Third Circuit has not yet addressed this specific issue. The alleged conflict petitioner has identified does not exist.

III. THE COURT BELOW CORRECTLY DETERMINED THAT THE RICO STATUTE REQUIRES AT LEAST SOME ECONOMIC PURPOSE.

The RICO statute in 18 U.S.C. § 1962(c) forbids "any person employed by or associated with any *enterprise* engaged in, or the activities of which affect, interstate commerce, to conduct or participate . . . in the conduct of such *enterprise's* affairs through a pattern of racketeering activity . . ." (emphasis added). The court of appeals correctly rejected petitioners' claim under § 1962(c) for failure to allege facts showing any "enterprise" within the meaning of RICO: petitioners have alleged no economic purpose or profit-seeking activity whatsoever on the part of respondents.

RICO does not define the term "enterprise" explicitly. Instead, the statute merely provides that " 'enterprise' *includes* any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). By using the

term "includes" instead of "means," Congress clearly indicated that not *every* individual, partnership, and so forth qualifies *per se* as an enterprise. Indeed, the enterprise concept itself would be superfluous if every person, legal entity, or association in fact automatically qualified as an enterprise.

Other provisions of RICO make it clear that the term "enterprise" must mean an undertaking in which one can "invest" by acquiring an "interest" in or funding the "establishment or operation" of the enterprise. *See* 18 U.S.C. § 1962(a), (b). The plain implication of the text, then, is that an "enterprise" under RICO must, at a minimum, be engaged in or directed toward some *economic* undertaking.[6]

The Second Circuit thoroughly analyzed this question in *United States v. Ivic*, 700 F.2d 51, 58-65 (2d Cir. 1983), and concluded that RICO does not apply unless the defendants have at least some financial motivation.[7]

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[6] In analyzing the term "enterprise," this Court "must start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 238 (1989) (internal quotation marks and citations omitted). An "enterprise," according to Webster's Third New International Dictionary (1981), can *in the abstract* be any plan, design, or undertaking. *Id.* at 757. The first definition given for a *concrete* enterprise, however, is as follows: "a unit of economic organization or activity (as a factory, a farm, a mine); *esp*: a business organization: FIRM, COMPANY." *Id.* (definition 1(c)). This economic connotation also appears in such uses as "Acme Enterprises" or the term "enterpriser," i.e., an "entrepreneur," defined as "the organizer of an economic venture; *esp*: one who organizes, owns, manages, and assumes the risks of a business . . . ." *Id.* at 757 (definition of "enterpriser"), 759 (first definition of "entrepreneur").

[7] The Eighth Circuit has also recognized that a RICO enterprise requires at least some economic purpose. *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir.) ("For purposes of RICO, an enterprise must be directed toward an economic goal"), *cert. denied*, 488 U.S. 974 (1988).

This economic motive need not be the sole, or even predominant motive, *United States v. Bagaric*, 706 F.2d 42, 53, 55 (2d Cir.), *cert. denied*, 464 U.S. 917 (1983); there need not even be a "*significant* economic purpose" for RICO to apply, *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir.) (emphasis in original), *cert. denied*, 474 U.S. 1023 (1985). But when neither the enterprise nor the predicate acts reveal "*any* financial purpose," RICO does not apply. *Ivic*, 700 F.2d at 65 (emphasis added).

The *Ivic* court gave several reasons for this conclusion. First, as discussed above, the text of §§ 1962(a) and (b) shows that "the term 'enterprise' quite clearly refers to the sort of entity in which funds can be invested and a property interest of some sort acquired, and hence the sort of entity which one joins to make money." 700 F.2d at 60. Thus, an "enterprise" "is evidently an organized profit-seeking venture." [8] Second, the title of the statute, "Racketeer Influenced and Corrupt Organizations," serves as an "aid in showing what was in the mind of the legislature," *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818). The terms "corrupt" and "racketeer" ordinarily would exclude "members of an organization striving for [a political or social goal] even by the most abhorrent means but without any desire for personal gain." *Ivic*, 700 F.2d at 61. The *Ivic* court likewise found support for its conclusion in the Congressional findings prefacing RICO, *id.* at 61-62, and the legislative history of RICO, *id.* at 62-64. Finally, the *Ivic* court observed that the RICO Guidelines of the Justice Department explicitly bar any indictment charging an "association in fact" as an enterprise " 'unless the association in

[8] The concept of "profit-seeking venture" is by no means limited to for-profit corporations. A non-profit corporation may charge for its services and pay a return to its investors. Governmental bodies may engage in bribery schemes. And even an unincorporated entity—a gang or robbers, for example—may seek a profit and provide a return to its "investors".

fact has an ascertainable structure which exists for the purpose of maintaining operations directed toward an *economic* goal . . .,' " *id.* at 64 (emphasis in *Ivic*) (quoting Guideline VI).

This statutory requirement of at least some financial purpose is not a judicially created obstacle to the proper functioning of RICO. Rather, as the Seventh Circuit recognized in this case, "this interpretation of § 1962(c) is dictated by the terms of the statute," 968 F.2d at 629, specifically the "enterprise" concept. The economic purpose element does no more than recognize a fundamental difference between those enterprises which engage in racketeering and corruption, even as a sidelight, *e.g.*, *United States v. Bagaric* (extorting payments from moderate Croatians as a means of furthering predominant nationalist political goals) from those movements which address exclusively political or social goals and, while breaking some laws, commit no "economic" crimes, *cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (civil rights activism included violent incidents).

RICO prescribes no murky inquiry into "how much" economic motivation a defendant has. Rather, the economic purpose element posits a straightforward, bright-line test: Is there *any* mercenary purpose? The crucial distinction is between "some" and "none"—between something and nothing—and that is all the difference in the world.

The Seventh Circuit, after thoroughly analyzing the decisions of other courts of appeals on the question, concluded that "the use of the term enterprise in §§ 1962(a) and (b) conveys a restriction to economic entities," 968 F.2d at 629; therefore, an identical "interpretation of [the word 'enterprise' in] § 1962(c) is dictated by the terms of the statute." *Id.*

The court of appeals then applied the economic motive requirement to the facts of the case at bar and correctly concluded that petitioners' complaint failed to satisfy this statutory requisite. *Id.* at 630.

In the instant case, petitioners have alleged no economic purpose whatsoever on the part of respondents. At most, petitioners point to the facts that respondent organizations receive third-party donations to support their work and that some of the individual respondents receive salaries or in-kind benefits (e.g., use of a car) from these organizations. 2d Am'd Cplt. at 37, ¶ 100. As the Seventh Circuit held, "it is not reasonable to infer that the purpose of the [petitioners' alleged conduct] is to raise funds" simply because that conduct "results incidentally in donations to support it," *id.*

The fact that an organization is donor-sponsored, or that it pays its employees or agents, simply has no connection at all to the legality of its activities or its liability under RICO. The court of appeals therefore correctly held that petitioners failed to satisfy the economic purpose requirement of RICO.

IV. AN ALTERNATIVE GROUND FULLY SUPPORTS THE JUDGMENT BELOW: THE ACTS ALLEGED DO NOT CONSTITUTE PREDICATE EXTORTION.

The Seventh Circuit rejected petitioners' RICO claim under 18 U.S.C. § 1962(c) for failure to allege facts sufficient to satisfy the economic purpose requirement of RICO. Petitioners urge this Court to construe RICO not to require *any* economic purpose whatsoever. Pet. at 12. But even if this Court were to do so, this would not help petitioners. The petitioners' complaint fails to state a RICO claim for an additional, wholly independent reason: a complete absence of the necessary "predicate acts." Thus, review of the "economic purpose" issue would be an advisory exercise.

Each subsection of the RICO statute requires proof of a "pattern of racketeering activity." 18 U.S.C. § 1962 (a), (b), (c). RICO specifies that a "pattern" of racketeering activity "requires at least two acts of racketeering activity," 18 U.S.C. § 1961(5). The necessary predicate acts of racketeering activity must in turn come within

RICO's definition of "racketeering activity," 18 U.S.C. § 1961(1), which lists the offenses that qualify as predicate acts. Thus, a RICO plaintiff must allege at least two "predicate acts" that fall within the RICO definition of "racketeering activity." Petitioners have failed to do so.

Petitioners rely exclusively upon allegations of "extortion" under the federal Hobbs Act, 18 U.S.C. § 1951. *See* 2d Am'd Cplt. at 31-36, ¶¶ 97-98; RICO Case Statement at 5. Hobbs Act violations do indeed constitute predicate acts under RICO. *See* 18 U.S.C. § 1961(1). The conduct petitioners alleged, however, does not make out even a *single* violation of the Hobbs Act, much less the minimum RICO requirement of *two* such acts.

The Hobbs Act, 18 U.S.C. § 1951, prohibits interference with commerce by "extortion," § 1951(a), and defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." § 1951(b)(2). Petitioners' complaint of predicate extortion under the Hobbs Act fails in four respects: 1) no allegation of "obtaining"; 2) no allegation of "property"; 3) no allegation of "consent"; and 4) no allegation of actual or threatened "force, violence, or fear."

The complaint specifies fifteen supposed predicate acts of extortion. *See* 2d Am'd Cplt. at 31-36, ¶ 98. The following chart lists the factual allegations corresponding to each alleged predicate act, and provides a brief description of the act in question. (Paragraphs refer to the Second Amended Complaint.)

Allegation of predicate act	Corresponding factual allegation	Description of act	
		Status	Substance
1. ¶ 98a	¶ 38	Attempt, conspiracy, commission	rescue blockade [9]

[9] A "rescue blockade" is a sit-in designed to prevent access to an abortion business. *See* 2d Am'd Cplt. at 12-13, ¶ 38; *id.* at 15, ¶ 47.

Allegation of predicate act		Corresponding factual allegation	Description of act	
			Status	Substance
2.	98b	40	Conspiracy	rescue blockades
3.	98c	41	Conspiracy	"unlawful, concerted action"
4.	98d	42	Attempt, commission	"stormed the clinic" and injured two persons
5.	98e	42	Commission	"stormed the clinic," "ransacked a medical procedures room," and destroyed surgical supplies
6.	98f	47	Attempt, conspiracy, commission	rescue blockade
7.	98g	44	Attempt	threat of "reprisals" should administrator of abortion business not quit job
8.	98h	53	Attempt, conspiracy, commission	rescue blockade
9.	98i(1)	59, 63	Attempt, conspiracy, commission	rescue blockades
10.	98i(2)	60	Attempt, conspiracy, commission	rescue blockades
11.	98i(3)	61	Attempt, conspiracy, commission	rescue blockades, trespass, and assaults upon police officers

Allegation of predicate act	Corresponding factual allegation	Description of act	
		Status	Substance
12. 98i(4)	62	Attempt, conspiracy, commission	rescue blockades
13. 98j	64-76	Attempt, conspiracy, commission	theft and concealment of fetal remains; publicizing and conducting funerals and burials of stolen fetuses [10]
14. 98k	69-76	Attempt, conspiracy	disclosure of identity of abortionists responsible for fetal remains; conducting and publicizing fetal funerals
15. 98l	64-76	Attempt, conspiracy	theft, concealment, and transport of fetal remains; threat to disclose identity of abortionists; publicizing and conducting funeral Masses and burials for stolen fetuses [11]

None of these alleged acts constitute federal criminal extortion.

[10] *See supra* note 4.

[11] *See supra* note 4.

A. No Allegation of "Obtaining."

A defendant may "obtain" property for purposes of the Hobbs Act in several ways. Most obviously, the extorter may personally receive a direct payment from the victim. *E.g., United States v. DeMet*, 486 F.2d 816 (7th Cir. 1973) (policeman extorting cash from merchant), *cert. denied*, 416 U.S. 969 (1974). The extorter may also "obtain" property for *another* person; no direct personal benefit to the extorter is necessary. *United States v. Green*, 350 U.S. 415 (1956) (extorting "wages" for employees performing unwanted, superfluous, or fictitious services).

In the case at bar, however, petitioners have alleged neither alternative. Petitioners have not alleged that respondents themselves either received or sought any benefit from any of the alleged victims of extortion. (The only "benefits" petitioners allege are donations and salaries which come, not from the alleged victims, but from independent sources.) Nor have petitioners alleged any attempt to coerce the transfer of any property to third parties.[12] Therefore respondents cannot, in any reasonable sense of the word, be guilty of "obtaining" any property.

B. No Allegation of "Property."

Petitioners identify the following supposed "property" extorted from the alleged victims: from employees, "jobs"; from doctors, the "economic right to practice medicine" at facilities that provide abortions; from patients, the "right to obtain services" at facilities that provide abortions; and from prospective patients, the "constitutional

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[12] Petitioners have alleged that certain "co-conspirators" themselves caused *damage* to the property of some abortion businesses. But vandalism alone—even intentional vandalism—is not extortion. Nor have petitioners themselves ventured so far as to allege that the property so damaged constitutes the property allegedly "obtained" by respondents. *See* 2d Am'd Cplt. at 31, ¶ 97 (describing "property" allegedly extorted).

right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force." 2d Am'd Cplt. at 31, ¶ 97; RICO Case Statement at 5. These abstract "rights" of uncertain legal status do not constitute "property" for purposes of the Hobbs Act.

Any unlawful conduct, whether a tort, a breach of contract, or even a parking violation, will interfere to some degree with another person's "right" to do as he pleases. But if such "rights" constitute "property" under the Hobbs Act, then there are simply no limits whatsoever to the kind of injury necesary to rise to the level of federal criminal extortion.

This Court rejected a similar attempt to expand the concept of "property" beyond all meaning in the context of the federal mail fraud statute. *See McNally v. United States*, 483 U.S. 350 (1987). The mail fraud statute, 18 U.S.C. § 1341, prohibits use of the mails for "obtaining money or property" by fraud. 483 U.S. at 352 n.1. In *McNally*, the government charged the defendant with defrauding Kentucky citizens "of their right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud . . . ." *Id.* at 354 n.4 (trial court's instruction to jury). This Court recognized an obvious difference between "property rights" and "the intangible right of the citizenry to good government." *Id.* at 356. Indeed, this distinction was so clear that the Court considered that the only "arguable" way of saving the prosecution would be to construe the mail fraud statute so as to dispense entirely with "the money-or-property requirement" for certain kinds of fraudulent schemes. *Id.* at 358. Relying upon the rule of lenity, the Court rejected a construction that would render the property requirement meaningless: "The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear

and definite language." *Id.* at 359-60 (citations omitted). The Court refused to construe the mail fraud statute "in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," and instead read the statute as "limited in scope to the protection of property rights." *Id.* at 360.

Acceptance of petitioners' strained characterization of abstract "rights" as property would likewise leave the boundaries of the Hobbs Act highly ambiguous and would put the federal government in the business of enforcing order in domestic social movements. Did the civil rights activists of the 1960's extort owners of diners of their "property right" to serve only the customers they chose? Employees of their "property right" to hold jobs in all-white establishments? White bus passengers of their "property right" to sit in the front of the bus? Such convoluted abstractions simply do not satisfy the "property requirement of the Hobbs Act.

C. No Allegation of "Consent."

The core of extortion is the inducement of voluntary—but coerced—action on the part of the victim. The Hobbs Act embodies this concept with its element of "consent" from the victim. Petitioners, however, have alleged no such extraction of consent.

Vandalism—even deliberate, serious property damage—is not the same as extortion. Nor are mere torts—even intentional torts—a form of extortion. This is because the consent of the victim is irrelevant to vandalism and intentional torts. The purpose of the vandal or tortfeasor is not to obtain permission for anything, but simply to inflict damage or injury.

In the case at bar, petitioners allege a conspiracy to shut down abortion businesses by unlawful conduct. But this is not extortion. Petitioners have not alleged that

respondents seek the *consent* of abortionists to blockade their facilities or publicly to display the remains of aborted babies.

Any unlawful activity exerts pressure on those who wish to avoid the consequences of that activity. But unless the Hobbs Act were construed to outlaw the universe of wrongful conduct, the deliberate seeking of some *consensual* conduct by the victim must remain a critical element of this statutory offense.

D. No Allegation of "Force, Violence, or Fear."

Conduct typical of civil disobedience—sit-ins, pickets, vehement rhetoric—does not constitute "force, violence, or fear" under the Hobbs Act. Petitioners have alleged no more than conduct of this sort;[13] hence, there can be no predicate extortion. *Accord Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 102 (2d Cir. 1990) ("it would be difficult to construe the [anti-abortion rescuers'] activities as described in the complaint, consisting of resistance to police efforts to clear protestors from the [abortion business] . . ., as the 'wrongful use of actual or threatened force, violence or fear' within the meaning of section 1951(b)").

In the case at bar, petitioners have sought to characterize a quintessentially social, moral, and political battle as "extortion." This semantic legal endeavor is flawed not only as a matter of statutory construction, but also as a

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[13] Arson and bombing would represent examples of force or violence; however, petitioners have alleged no such predicate acts. Petitioners have alleged a solitary incident of apparent assault by persons who are not defendants in this case. 2d Am'd Cplt. at 14, ¶ 42. But petitioners have alleged no connection to respondents that would support legal liability for this isolated incident. Liability of one person for the acts of another "certainly . . . cannot" rest upon a finding of an agency relationship "simply because both shared certain goals." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 925 n.69 (1982) (citation omitted).

fundamental matter of jurisprudence. As the sponsor of the Hobbs Act noted, the words "robbery" and "extortion" have been construed a thousand times by the courts. Everybody knows what they mean." 91 Cong. Rec. 11912 (1945) (quoted in *United States v. Culbert*, 435 U.S. 371, 378 (1978)). Petitioners' artificial and unbounded construction of the Hobbs Act, like the prosecutor's attempted expansive reading of that same Act in *McCormick v. United States*, 111 S. Ct. 1807, 1816 (1991), is "an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent . . . ."

For forty years after the passage of the Hobbs Act of 1948, not a single reported decision suggested that the pursuit of social, moral, or political goals through pressure tactics—including lawbreaking in the form of trespass, obstruction, mass picketing, and incidental scuffling —constitutes federal criminal extortion. The isolated and aberrant decision in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), cannot have singlehandedly revolutionized American jurisprudence.

Civil disobedience and social or political pressure tactics are "as American as apple pie," and characterizing ideological movements as extortionate simply because of the use of these traditional methods would move this country precisely in the direction of totalitarian oppression so recently abandoned in the former Soviet Union. The theory of petitioners' complaint would make a racketeer and an extortionist out of everyone from Mohandas Gandhi, to Martin Luther King, Jr., to the leaders of the Boston Tea Party. Petitioners' construction of RICO and the Hobbs Act would distort these statutes into weapons for combatting anti-nuclear protestors, animal rights activists, and opponents of apartheid. But as the Ninth Circuit declared in *United States v. Caldes*, 457 F.2d 74 (9th Cir. 1972) (cited with approval in *United States v.*

Enmons, 410 U.S. 396, 409 (1973)), "it appears to us that vandalism of the type committed by these [defendants] would be more properly and suitably prosecuted in the state courts and it is doubtful if Congress intended by Section 1951 to elevate this type of conduct to the level of the federal court." 457 F.2d at 79 (citing *United States v. Bass*, 404 U.S. 336 (1971)).

Seventeen years ago Judge (now Justice) Stevens observed for an en banc Seventh Circuit that the "extraordinary growth of federal criminal litigation poses a serious threat to the quality of federal justice; moreover, this growth may not only reflect but contribute to the continuing transfer of power from the several states to the national government." *United States v. Stasczuk*, 517 F.2d 53, 55 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975). Judge Stevens confirmed that "we have no desire to accelerate this trend unnecessarily," 517 F.2d at 55. This Court expressed the same caution in refusing to apply the Hobbs Act to unlawful conduct incident to a labor strike:

> First, this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity. . . . Secondly, it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.

United States v. Enmons, 410 U.S. at 411 (citations omitted). These same principles govern the case at bar.

Petitioners have failed to allege facts that would constitute even a single predicate act of federal criminal extortion. Whereas the RICO statute requires at least

two or more such predicate acts, petitioners' complaint is fatally deficient. It follows that there is simply no occasion even to reach the "economic purpose" question on which petitioners seek review.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

WALTER M. WEBER
(Counsel of Record)
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, D.C. 20007
(202) 337-2273

VINCENT P. MCCARTHY
8 South Main Street
New Milford, CT 06776
(203) 355-0923

LAWRENCE M. GAVIN
BELL, BOYD & LLOYD
Three First National Plaza
Suite 3000
70 West Madison Street
Chicago, IL 60602
(312) 372-1121

Attorneys for Respondents Randall A. Terry, Project Life, and Operation Rescue

December 23, 1992

APPENDIX

APPENDIX

Selected Excerpts of Ex. B to Plaintiffs' Responses to Terry's First Interrogatories to All Plaintiffs (July 16, 1990)

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Bierbaum, Hank	
Billings, Dot and Lloyd	Missouri
Binkley, Lawrence	
Birckell, Hays	Denver, CO
Bird, Robert	
Birgen, John	
Bisol, Lisa Marie	[ ] Palm Bay Road, N.E. No. [ ] Palm Bay, FL
Bittenbender, Capt. Carl	
Bitz, Dennis	P. O. Box 150 [ ] N. 3rd St. Fargo, ND 58107
Bixby, Bonnie	
Bjune, Russell	Brooklyn, NY
Black, David	Three Rivers, MI
Blackmun, Harry	
Blackwell, Edwina	
Blackwell, J. Kenneth	Cincinnati, OH
Blaine, Ellen	
Blair, Rev. Beatrice	NYC
Blancato, Nancy	[ ] Carmichael Pkwy. P.O. Box 17352 Montgomery, AL 36117 (205) 277-[ ]
Blanton Elizabeth	
Blasko, Mary	
Blomgren, Danny	Spokane, WA
Bloom, David	[ ] Hadden Avenue Akron, OH
Bloom, Howard	
Blum, Joanne	Washington, D.C.
Blumenthal, Hope	(212) 645-[ ]

Bluni, Gail	
Bobo, James Christian	
Bodine, Mark	
Bogan, Chris Fow	[ ] Gransborough Ct. Fairfax, VA 22030 (703) 691-[ ]
Bogojavlensky, MD	Worcester, MA
Bohl, Carolyn	Cleveland, OH
Boltino, Fr. Dominic	
Bond, Gov. Kit	Missouri
Bond, Leslie	
Bonder, J. Earle	
Bonnel, William Edward	[ ] N.E. 23rd Terrace Pompano Beach, FL
Bonner, Brian	P.O. Box 14263 Washington D.C. 20044 (202) 638-[ ]
Bonner, Lane	Washington, D.C.
Bonning, Jim	Louisville, KY
Booker, Lorri Denise	
Bopp, Jame	Indiana
Bork, Helen	Wisconsin

• • • •

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Kaufman, Laura	Chicago (312) 922-[ ]
Kavanaugh, Carol	
Kavanaugh, Louis, Jr.	
Keaggy, Phil	
Keating, John	[ ] 1st Ave. N. Fargo, ND 58102
Keck, Dallas W.	Portland, OR
Keefe, Eileen	[ ] Calvert St. N.W. Washington, D.C. 20016 (202) 332-[ ]
Kefauver, Julia	Indiannapolis, IN
Kefauver, Walter	Indiannapolis, IN
Kefauver, Wayne	Indiannapolis, IN
Keichline, Rev. Bill	
Keith, Greg	

Keller, Richard	
Kelly, James	Darby, PA
Kelly, John, MD	
Kelly, Kathy	
Kelly, Pete	
Kemler, Elea	[ ] 14th St. N.W. Washington, D.C. 20003 W: 783-[ ] H: (202) 829-[ ]
Kemme, Steve	
Kemp, Kathy	
Kempf, David and Candy	Jefferson City, MO
Kempf, Mary	
Kendrigan, Mary	Atlanta, GA
Kennedy, Anthony, Hon.	
Kennedy, Gaytha	
Kennedy, D. James Ph.D.	[ ] N. Federal Highway Ft. Lauderdale, FL 33308
Kennedy, Jane	[ ] W. Colonia Dr. Orlando, FL 32804 (305) 898-[ ]
Kennedy, Joseph III	
Kennedy, Makel	[ ] Stratford St. Louis, MO
Kennedy, Mary	
Kennedy, Ted	
Keplik, Lewis MD	
Kerr, Bonnie	Fargo, ND
Kildee, Rep. Dale	MI
Kilman, Richard	Wilmington, DE
Kimmy, Jimmye	
King, Craig Lee	[ ] Wayland Rd. S.W. Palm Bay, FL
King, Lt. Greg	
King, Henry V.	
King, Lou	462-[ ] 660-[ ]
King, Patricia	

* * * *

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Malnich, Janet	South Bend, IN
Malone, Tyrone	NJ
Maloney, Betty	
Mandel, Marjorie	
Manees, Barbara	
Manler, Paul	
Manley, Paul	
Mann, Judy	
Mann, Mercedes	[ ] Cathedral Ave. N.W. Washington, D.C..20016 (202) 244-[ ]
Mann, Nancy Jo	
Mann, Terry	
Mannies, Jo	
Mansnerus, Laura	
Mansour, Mary Agnes	
Mantylia, Doris	
Marchese, Rosemary	Atlanta, GA
Marcus, Ruth	
Marden, Janet	
Marino, Archbishop Eugene	Atlanta, GA
Marke, Fr. Paul	Washington, D.C.
Markley, Fr. Edward	#144-147 Box 1107 Dr.aper Correctional Institute Elmore, AL 36205 (204) 267-2221
Markovich, Bob	
Markum, Roland	[ ] Ridley Avenue Norwood, PA
Marquiss, Debra Jean	[ ] Gadsden Avenue, N.W. Palm Bay, FL
Marsh, Jon	Escambia County
Marshall, David Ray	
Marshall, Robert G.	
Marshall, Steve	
Marshall, Hon. Thurgood	
Martel, Espie	
Martin, Barbara	Spokane, WA
Martin, Carols J. M. MD	

Martin, Donald	
Martin, Ed	Ocala, FL
Martin, Leon	Pensacola
Martin, Patte	[ ] Herman Ave. Orlando, FL 32803 H: [ ] Park Lake Circle Orlando, FL 32803 (305) 896-[ ]
	W. [ ] N. Magnolia Ave. Orlando, FL 32803 (305) 423-[ ]
Martin, Priscilla	Oregon
Martinez, Lisa	

* * * *

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Noble, Anne R.	
Nolan, Chris	
Nolan, Lucy	CT
Nolen, John	Spokane, WA
Nolte, Bob	NY
Noms, Jay	
Noonan, John T.	Berkeley, CA
Norad, Lorijo	Michigan
Nordreemer, Jon	
Norko, Judge Raymond R.	CT
Norotny, Susan	Pensacola, FL
Norris, Murray, Ph.D.	
North, Gary, Ph.D.	
Notes, Sarah	[ ] Columbia Rd. N.W. # [ ] Washington, D.C. 20009 (202) 462-[ ]
Novak, Judge Raymond	
Nufer, Kathy Walsh	
Nungester, Richard L.	Spokane, WA
Nunes, Flo	Spokane, WA
Nuzzio, Lt. Michael	Cherry Hill, NJ
O'Brien, Ann	St. Louis, MO
O'Brien, Art	New York (516) 746-[ ]

O'Brien, Duran	
O'Brien, Jack	Philadelphia, PA
O'Brien, John	[ ] Raewyck Dr. West Chester, PA
O'Brien, Lee	[ ] Pryor Street, S.W. Atlanta, GA 30335 (404) 730-[ ]
O'Brien, Mike	Cincinnatti, OH
O'Brien, Nancy	OH
O'Brien, Pat	Philadelphia, PA
O'Connell, Colleen	
O'Connor, Fr. John	
O'Connor, Catherine	
O'Connor, John Cardinal	New York, NY
O'Connor, Richard Joe	Illinois
O'Connor, Rita	[ ] Silent Wood La. Reston, VA 22091 H: (703) 648-[ ] W: (703) 742-[ ]
O'Connor, Justice Sandra Day	
O'Dell, Raymond	
O'Donnell, Bernard J.	
O'Donnell, Eileen	
O'Donnell, Mike	Atlanta, GA
O'Donnell, Paul	Minneapolis, MN
O'Keefe, John Cavanaugh	Washington, D.C. Gaithersberg, MD
O'Keefe, Lucy	
O'Malley, Mary	
O'Mally, John M.	Spokane, WA

* * * *

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Pickett, William	Spokane, WA
Pillsbury, Madison & Sutro	San Francisco
Pine, Rachael, Esq.	
Pine, Rachel	
Pinelli, Teresa	
Pini, Sue	
Piron, Gayle	
Piron, Rachel	

Pittman, Craig	
Pittman, Karen	Washington, D.C.
Pitts, William	Kansas City, MO
Plata, Greg	Philadelphia, PA
Pocock, Tom	
Pollack, Amy, M.D.	
Pollock, Betty	[ ] Claytonbrook, Apt. [ ] St. Louis, MO 63011
Poole, Patrick	[ ] Rose Court Kalamazoo, MI
Poppema, Suzanne, M.D.	
Postlethwait, Monte	[ ] Newton St. N.W. Washington, D.C. 20010 (202) 234-[ ]
Potter, Gary	
Potter, M.C.	Black Forest, Colorado
Powell, Dan	
Power, Edward	
Powell, Hon. Lewis	
Power, Timothy	[ ] Conway St. Louis, MO
Prathes, Joe	
Pratt, Jim	[ ] 24th Ave. San Francisco, CA
Preat, Earnest	PA Attorney General Strawberry Square Harrisburg, PA (717) 787-3391
Prendergrast, Alexia	895-[ ]
Presenzia, Judge	Philadelphia, PA
Press, Jill	Cherry Hill, NJ
Presser, Esther	
Preston, Virginia	
Price, Sgt. Bill	Escambia County
Price, Capt. B.Q.	Wichita
Price, Diana	
Prise, Darryl MD	Dallas, TX
Pristin, Terry	
Probert, Lois	
Procter, Carlton	

Provaznik, Hon. Richard	St. Louis County
Pruitt, Rev. Dusty	
Pugh, Tony	
Puli, Margaret	

* * * *

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Pursley, Fr. Dow	Arkansas
Pursley, Melissa	AR
Pyne, Sandee	(215) 867-[ ]
Pyrdum, Sgt. Carl S. Jr.	Atlanta, GA
Quayle, R. Danforth	
Quilte, Donna	
Rader, Tammy	Spokane, WA
Radezky, Joy	Spokane, WA
Radford, Barbara	
Ragland, Steven	(215) 867-[ ]
Ragsdale, Katherine	P. O. Box 187 Edinboro, PA 16412 (814) 739-[ ]
Ragsdale, MD	Rockford, IL
Ragusa, Ann	
Ramey, Catherine	Mil, OR
Randall, Joseph MD	
Randall, Lynne	[ ] Fourteenth St. N.W. Atlanta, GA 30318 (909) 879-[ ]
Rasmussen, Jeri	MN
Rathburn, Bruce	
Ratner, Herb, MD	
Rattner, Lisa	
Ravenal, S. DuBose MD	
Ray, Randall	[ ] North Mollison El Cajon, CA
Rea-Luthin, Marianne	Massachusetts
Rebech, Daniel C.	
Recker, James	
Reckman, Barbara	
Redfern, Charles	
Reed, Francis A. MD	
Reed, Marjorie	

Reeder, Richard	
Rehberg, Wes	
Rehnquist, Hon. William	
Reichman, John L.	Spokane, WA
Reilly, William M.	
Reiswender, Chet	Pensacola, FL
Rendal, Judge Joel	[ ] 112th Street S.E. Bellevue, WA 98004 (206) 296-[ ]
Reque, Paul	Grand Chute, WI
Respereny, Catherine	
Ressler, William	
Retter, Fr. Wendelyn	Fargo, ND
Revera, Marie	
Reynolds, Ann	[ ] Weaver Kalamazoo, MI
Reynolds, Audrey	
Reynolds, Bonnie	Spokane, WA
Reynolds, Hon. John	Wisconsin
Rhoden, Yalinda	Akron

* * * *

[page 50]

Sand, Gayle	Iowa City, IA
Sanders, James A.	[ ] Rose Court Kalamazoo, MI
Sanders, Petra V.	
Sanders, Roger P.	Prickett, Ward, Burt & Sanders 1310 King Street Wilmington, DE 19801
Sanders, Scott	[ ] Seaton St. N.W. Washington, D.C. 20009 (202) 234-[ ]
Sanders, Wayne	Manchester
Sandstrom, Eric	
Sanger, Margaret	
Sanseverino, Gay	Gaithersburg, MD
Sasscer, Roland Russell	[ ] Halstead Ave., N.W. Palm Bay, FL
Sassone, Robert Esq.	

Sassone, Susan M.	Fountain Valley, CA
Satterfield, Led	
Savage, Gerald	
Savato, Al	
Say, Rev. William	
Saylor, Kevin	
Saylor, Wanda	
Scalia, Justice Antonin	
Scanlan, Bishop John J.	Honolulu, HI
Scarf, Rev. Daniel	Spokane WA
Schachtschober, Eric	
Schaefer, Franky V	[ ] Winchester, Suite [ ] Los Gatos, CA 95030
Schaefer, Lt. John T.	Cyprus, CA
Schaeffer, Francis	
Schaeffer, Franky	
Schaeffer, Pamela	
Schaeffer, Rose	
Schafer, Janet	
Schanne, Michael Joseph	[ ] Wyncote Road Jenkintown, PA 19046
Schanuel, Loralie Lunn	[ ] Tree Ridge lane, N.E. Palm Bay, FL
Scharf, Laura	
Schecht, Ellen	
Schechtel, Martha	Oregon
Scheidler, Ann	[ ] N. Leroy Ave. Chicago, IL 60646
Scheidler, Joseph	[ ] N. Leroy Ave. Chicago, IL 60646
	[ ] North LeMai Ave Chicago, IL 60601
	[ ] N. Cicero Ave Chicago, IL 60646

* * * *

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Stevens, Elliot	[ ] Front St. Wilmington, DE

Stevens, Janet	785-[ ]
Stevens, Hon. John Paul	
Stevens, Patricia	
Stevens, Mr. and Mrs. Stocky	
Stevenson, Mary L.	RD 4 Box 300 Middlebury, VT 05753 462-[ ]
Steward, Lt. John	Cherry Hill, PA
Stewart, Anne	
Stewart, Candace	
Stewart, David	South Bend, IN
Stewart, Iva Marie	
Stewart, John	
Stewart, Kathy	
Stewart, Lisa	320-[ ]
Stewart, Maurice	Chesterfield, MO
Stickles, Michael A.	[ ] Club Trailm, No. [ ] Melbourne, FL
Stickney, Allie	
Still, Anne	
Stillwell, Georgia	
	Atlanta, GA
Stingl, Jim	
Stockton, Debbie	
	Arlington, VA
Stokes, Lon S.	
	Spokane, WA
Stokes, Rosemary	[ ] S. Tripp Ave. Chicago, IL
Stolley, Richard	
Stone, Diane	[ ] Shumate St. Louis, MO
Stone, Rev. Jerry	
	Appleton, WI
Stone, Lisa	
Stone, Rev. Norman	
	[ ] W. Prospect Appleton, WI
Stoneking, Mark	
Stons, Nancy J.	
Stoos, John	CA

Storer, Dawn	Portland, OR
Stout, Rev. Donna Morton	
Stover, Dawn	OR
Strader, Nancy	
Stradling, Thomas D.	
Stratford, Marie C.	

* * * *

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Weaver, Helen	
Webb, Robert	
Webb, Ronald M.	Spokane, WA
Webber, Tom	Minneapolis, MI (612) 698-[ ]
Webber, Walter	[ ] N. Wells St. Milwaukee, WI 53233
Webster, Lee Ronald	[ ] Shoreview Circle Indialantic, FL
Webster, William H.	Washington, D.C.
Wein, Helen	Atlanta, GA
Wein, Louis	Seattle, WA
Weiner, Bob	
Weiner, Tim	
Weinstein, Linda	
Weir, Diane	
Weiss, E.J.	
Weiss, John	
Welch, Jan	[ ] 34th St. N.W. Washington, D.C. 20008
Wells, David	
Wells, Donna	
Wells, Shirley	Spokane, WA

Welton, Rob	
Wendt, Paula	Minneapolis, MN
	(612) 925-[ ]
Wernicke, Carl	
West, Cindy	
West, Joan	Mahoning Valley, OH
West, William W.	
Westphal, Buzz	
Westphal, Denise	
	Kansas City, MO
Wheaton, Therese	
Whelton, Robert	
Whibbs, Vince	
	Penscola, FL
Whipple, Beverly	
	Seattle, WA
White, Justice Byron	
White, Byron P.	Portland, OR
White, Cheryl Dianne	
	[ ] Orleandor Ave
	Satellite Beach, FL
White, Eric Thomas	

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No. 92-780

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Petitioners,
v.
JOSEPH M. SCHEIDLER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS JOSEPH M. SCHEIDLER, TIMOTHY MURPHY, ANDREW SCHOLBERG, AND THE PRO-LIFE ACTION LEAGUE, INC.

ROBERT S. HARLIB
105 W. Madison St.
Suite 300
Chicago, IL 60602
(312) 236-6605

THOMAS BREJCHA *
ABRAMSON & FOX
One East Wacker Drive 38th Fl.
Chicago, IL 60601
(312) 644-8500

CLARKE D. FORSYTHE
PAUL BENJAMIN LINTON
KEVIN J. TODD
AMERICANS UNITED FOR LIFE
343 S. Dearborn St. #1804
Chicago, IL 60604
(312) 786-9494
Counsel for Respondents

* Counsel of Record

December 23, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Petitioners, a national membership organization, and two abortion clinics, brought claims under the Sherman and Clayton Antitrust Acts, 15 U.S.C. § 1, § 26, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, and pendent state claims seeking treble damages and a nationwide, federal injunction against persons and organizations who engage in political protest against abortion clinics—including, *inter alia* demonstrations, rallies, picketing, leafletting, sit-ins, and other First Amendment-related activities. Over the course of five years, Petitioners engaged in voluminous discovery and filed a first and second amended complaint. The district court dismissed all counts of their second amended complaint. The court of appeals unanimously affirmed.

1. Whether Petitioners' antitrust complaint against demonstrators was properly dismissed when they failed to allege that the demonstrators engage in business activity in the commercial marketplace, are commercial competitors, have any market power, have any commercial motive, or engage in any commercial conspiracy.

2. Whether Petitioners' complaint alleging RICO extortion by demonstrators was properly dismissed when they failed to allege any economic motive in the enterprise or the predicate act.

3. Whether Petitioners' complaint alleging RICO extortion was properly dismissed when they failed to allege that the demonstrators obtained, or conspired to obtain, any property from the clinics, doctors, patients, or prospective patients.

4. Whether Petitioners' antitrust and RICO claims were properly dismissed when they failed specifically to tailor their claim against demonstrators whose exercise

of First Amendment rights of free speech, assembly, petition, and association was allegedly intertwined with sporadic acts of trespass, theft, and vandalism.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-780

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Petitioners,

v.

JOSEPH M. SCHEIDLER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS JOSEPH M. SCHEIDLER, TIMOTHY MURPHY, ANDREW SCHOLBERG, AND THE PRO-LIFE ACTION LEAGUE, INC.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the U.S. Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Hobbs Act provides, in pertinent part:

> (1) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. § 1951(b)(2) (1982). Other statutory provisions are reproduced in the Petition (Pet. at 2-3).

STATEMENT OF THE CASE

Petitioners filed a single-count complaint under the federal antitrust laws (Sherman Act, 15 U.S.C. § 1, and the Clayton Act, 15 U.S.C. § 26), in 1986 in the District of Delaware against Respondents and other defendants.[1] The suit was voluntarily dismissed. Petitioners refiled their single-count, antitrust class action complaint in the Northern District of Illinois on October 17, 1986 (No. 86 C 7888). Petitioners sought declaratory and nationwide injunctive relief. No class was ever certified.

Petitioners pursued discovery nationwide—reviewing hundreds of tapes, files, and correspondence of Respondents and numerous others—which ensued for four years, with depositions conducted in seven cities across the country—including Chicago, Fargo, North Dakota, Fort Wayne, Indiana, St. Louis, Durham, North Carolina, Jacksonville, Florida, and Washington, D.C. The extensive discovery matters caused the district court to defer discovery matters to a federal magistrate.

Petitioners filed a first amended complaint on February 2, 1989, which added alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, in addition to the original

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[1] The plaintiffs originally consisted of the National Organization for Women, the Delaware Women's Health Organization, and the Ladies Center of Pensacola. The Ladies Center was dismissed from the case. Petitioner Summit Women's Health Organization was added in the first amended complaint. For purposes of brevity, Respondents refer to the plaintiffs as the "Petitioners" throughout this Brief in Opposition.

Joseph Scheidler and the Prolife Action League, Inc. were among the original defendants. Timothy Murphy and Andrew Scholberg were added as defendants in amended complaints. For purposes of brevity in this Brief in Opposition, "Respondents" refers to Joseph Scheidler, the Pro-life Action League, Inc., Timothy Murphy, and Andrew Scholberg, unless otherwise indicated. Pursuant to this Court's Rule 29.1, the Pro-Life Action League, Inc. has no parent company or subsidiary.

Sherman Act allegations, and added prayers for treble damages. The first amended complaint also added a host of new defendants, including Vital-Med Laboratories and Conrad Wojnar, alleged new conspiracies, and added three new pendent state claims. The conspiracy allegations were so broadly drawn that Petitioners later claimed that they embraced hundreds of thousands of co-conspirators.

After nearly three years of discovery, Petitioners filed a second amended complaint on September 22, 1989 (hereinafter "the Complaint") (*See* Appendix 1a). The Complaint alleged that Respondents conspired to "drive every clinic in the United States . . . out of business" (Complaint, § 26) and that they had engaged in "unlawful, concerted action, including repeated acts of trespass, extortion and vandalism directed at women's health centers. . . ." (¶ 27). Petitioners also alleged the theft of fetal remains and their use in a media campaign against abortion clinics. They alleged that Respondents and other defendants, and one or more employees of defendant Vital-Med, "conspired to steal fetal remains located in Vita-Med's research laboratory in Northbrook, Illinois," stole some 4,000 specimens over a period of 10 months, and conspired to "use the specimens as part of their drive to disrupt the operations of health clinics generally. . . ." (¶¶ 64-66). Among the alleged uses were "actions designed to intimidate and harass clinics by focusing attention on the stolen specimens" including "highly publicized" funeral masses and burials (¶¶ 37, 64-78). Petitioners alleged that the purpose of Respondents' actions "is to force all clinics that perform abortions out of business and to eliminate the choice of abortion for women who are pregnant." (¶ 85).

The only allegations about "competition" are contained in ¶¶ 2, 17-19, and 80-91. Paragraph 2 alleged:

> In furtherance of their conspiracy, defendants and their co-conspirators have, inter alia . . . established

> competing pregnancy testing and counseling facilities in the vicinities of the clinics, sometimes in the same buildings where clinics are located, homes for pregnant women and, on information and belief, prenatal and delivery services, foster homes and private adoption agencies.

(App. 2a). Paragraph 11 also alleged that Randall Terry "runs a pregnancy testing and counseling center in Binghamton, New York" and ¶ 13 alleged that Conrad Wojnar "runs a number of anti-abortion women's medical clinics in the Chicago area. . . ." In addition, the "business" of the Pro-Life Action League, Inc. (¶ 17), the Pro-Life Direct Action League, Inc. (¶ 18), and Operation Rescue (¶ 19) is alleged to "consist[] of disrupting and closing women's health centers that perform abortions through the use of illegal activity."

Count I, brought by N.O.W. and the abortion clinics, alleged that the actions of various defendants were designed and threatened to restrain interstate trade, had "an anti-competitive effect," increased expenses and costs, made it more difficult for women to obtain abortions, damaged the abortion businesses, interfered with "ongoing business and contractual relationships" and threatened to increase the risk of medical complications "by exposing . . . women to a pattern of harassing and intimidating conduct designed to create stress and to stop them forcibly from exercising their choice to have an abortion" (¶¶ 80-91). Petitioners asked for declaratory relief "that the actions of" Respondents "have violated the rights of" the clinics and their patients to be free of restraints of trade and for injunctive relief to enjoin Respondents both "from carrying out a concerted effort to drive women's health centers . . . out of business" and "from using unlawful means to drive women's health centers . . . out of business." (¶¶ 79-93).

The RICO claims were brought only by the abortion clinics, also as purported class actions. Count II is a RICO

§ 1962(a) claim. Petitioners alleged that Respondents formed enterprises "with common purposes, including driving all clinics that provide abortion services out of business" (¶¶ 95-96). The sole RICO predicate act alleged is extortion, described as:

> Defendants conspired to, attempted to or did wrongfully use threatened or actual force, violence or fear to induce or attempt to induce the employees of affected clinics to give up their jobs; doctors involved with affected clinics to give up their economic right to practice medicine at the plaintiff clinics; patients of affected clinics to give up their right to obtain services at the plaintiff clinics; and prospective patients of clinics to give up their constitutional right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force.

(¶¶ 97-98). Petitioners made no allegations that any defendant or co-conspirator attempted to obtain, or obtained, any property or thing of value from any clinic, doctor, patient, or prospective patient.

Counts III and IV are RICO § 1962(c) and (d) claims. They alleged that Respondents and other defendants are associated with one of the enterprises, Pro-Life Action Network (PLAN), and "participated in PLAN's affairs through a pattern of racketeering activity" (¶ 109), namely the extortion alleged in ¶¶ 97-98. Petitioners alleged that Respondents engaged in a conspiracy to "use the income they received from a pattern of racketeering activity . . . to establish or operate PLAN" and "agreed to the commission of the extortionate acts from which the above-mentioned income would derive" (¶¶ 112-113). The remaining counts alleged pendent state claims.

On August 30, 1990, Respondents filed a motion to dismiss the Complaint or in the alternative for a more definite statement in the form of a RICO cases statement. Petitioners filed a RICO cases statement on March 18, 1991, including 29 pages of text and two appendices of 41

and 36 pages respectively, alleging numerous acts of violence, including even arson and bombing by Respondents' co-conspirators. The Complaint alleged sporadic acts of trespass, vandalism, assault, battery, and theft by Respondents, other defendants, or unnamed co-conspirators (¶¶ 2, 27, 40, 42, 46-50, 61, 64, 67, 74, 97-98). There are no allegations in the Complaint of bombing or arson by any Respondent, other defendants, or their "co-conspirators."

Two months later, on May 28, 1991, the district court granted Respondents' motion to dismiss, holding that Petitioners failed to state a claim under either the antitrust laws or RICO, and dismissed the case in its entirety. *National Organization of Women v. Scheidler*, 765 F. Supp. 937 (N.D. Ill. 1991). The court of appeals unanimously affirmed. 968 F.2d 612 (7th Cir. 1992). A petition for rehearing was filed and denied on August 4, 1992, with "no judge in active service" requesting a vote on the suggestion for rehearing en banc (Pet. App. G-2). The Petitioners filed their petition for certiorari on November 2, 1992. An extension of time to December 23, 1992 to file Briefs in Opposition was granted to all Respondents.

REASONS FOR DENYING THE WRIT

From the founding, political protest has played an integral role in shaping public opinion and policy in American life. Our nation was born of the political "demonstrations" and "riots" instigated in response to the Stamp Act of 1765. J. Ferling, *John Adams: A Life* 41-42 (1992). The "crisis caused many in the colonies to rethink ingrained attitudes" and "transformed the constitutional and ideological outlook of many within the colony." *Id.* at 42. Seventy-five years later, abolitionists pursued a strategy to rescue slaves from their owners in cities both north and south. Rescue—to prevent loss of freedom or life—has a venerated place as a part of

political expression in American history. L. Filler, *The Crusade Against Slavery: 1830-1860* (1960). More recently, the Reverend Martin Luther King, Jr. and the civil rights movement pursued "non-violent direct action," including picketing, marches, leafletting, boycotts, and sit-ins. *See e.g., Taylor v. Louisiana*, 370 U.S. 154 (1962); *Garner v. Louisiana*, 368 U.S. 157 (1961). Such sit-ins were criticized as "violent" because "they created 'a great deal of tense pushing and shoving, in an atmosphere that is electric with restrained violence and hostility.'" S. Oates, *Let the Trumpet Sound: The Life of Martin Luther King, Jr.* 161 (1985). The demonstrators sought to create "tension" to induce change and to bear witness to the evils against which they were protesting.[2]

Under Petitioners' theory of this case, these Americans were racketeers and antitrust violators, not patriots or social reformers. Those who dumped British tea in Boston Harbor "extorted" the right to do business under "force, threat or fear" and made it harder to "compete" with other tea merchants. Those who rescued slaves "extorted" the right to trade slaves and made it harder to "compete" by increasing costs. The civil rights demonstrators of the 1960's "extorted" the right to serve food to whites only at lunch counters and had an "anti-competitive effect" by boycotting white merchants.

Here, Petitioners bootstrap what are, at most, state torts and misdemeanors through elaborately contrived interpretations of the Sherman Act and RICO in an attempt to obtain federal jurisdiction and a nationwide

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[2] Oates at 216 ("The purpose of direct action, King said, was 'to create such a crisis and foster such a tension that a community which has constantly refused to negotiate is forced to confront the issue.") 218, 287, 327, 397; D. Garrow, *Bearing the Cross: Martin Luther King, Jr. and the Southern Christian Leadership Conference* 236 (Vintage Books 1988) ("'If you create enough tension, you attract attention to your cause and get to the conscience of the white man,' King explained."), 246-47, 273-74.

injunction against their ideological opponents, pro-life demonstrators. This case does not warrant this Court's review because the decision below was clearly correct and presents no conflicts with other circuits. The Sherman Act was not intended to apply to non-commercial, political protest by demonstrators not involved in the commercial marketplace. Likewise, RICO requires that the predicate act or enterprise be economically motivated. Furthermore, the judgment below could be affirmed on three alternative grounds. First, the *Noerr-Pennington* doctrine immunizes these political demonstrators. Second, no Hobbs Act extortion was properly pled in this case because Petitioners did not, and cannot, charge that the demonstrators obtained any property of the Petitioners or their patients. Third, Petitioners were subject to a heightened pleading burden which they repeatedly spurned, seeking relief against First Amendment-protected activity. Accordingly, the petition should be denied.

I. THERE IS NO CONFLICT IN THE CIRCUITS ON THE COURT OF APPEALS' HOLDING THAT THE SHERMAN ANTITRUST ACT DOES NOT APPLY TO NON-COMMERCIAL PROTEST.

Petitioners' claimed conflict in the circuits on the antitrust holding is illusory. It is based on a misreading of the court of appeals' opinion and on a 1920 Eighth Circuit case that is distinguishable and is no longer good law. Neither warrants review by this Court.

Petitioners' claim that the court of appeals created a "good motives exemption" to the Sherman Act is spurious. The court of appeals did not conclude that Respondents had "good motives"; indeed, the court exercised judicial restraint by finding no Sherman Act liability despite its comment that the demonstrators' actions (merely alleged) were "reprehensible." 968 F.2d at 621, 630. Rather, the court held that the Sherman Act was not intended to apply to non-commercial public opposition and demon-

stration, notwithstanding an impact on business. *Id.* at 614, 617, 622. The Sherman Act was "intended to prevent business competitors from making restraining arrangements for their own ecoonmic advantage." *Id.* at 621.

The sole alleged conflict that Petitioners can identify is between the decision below and a 1920 case from the Eighth Circuit, *Council of Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920). This case is distinguishable upon the facts and the holding. There, a state-created committee implemented a boycott to affect the competition between "patriotic" and "unpatriotic" magazines by trying to persuade newsdealers to cancel contracts with an "unpatriotic" magazine owned by William Randolph Hearst. The aim was to single out and destroy Hearst's business. *Id.* at 411. However, commercial relationships and activities were directly at issue and, unlike Respondents here, the Council of Defense did not seek to ban the market altogether.[3]

More important, the Seventh Circuit's conclusion that *Council of Defense* is no longer good law is clearly correct. It was significantly limited by the Eighth Circuit in *Missouri v. NOW*, 620 F.2d 1301, 1304 n.4, 1315 n.16 (8th Cir. 1980). Moreover, it precedes this Court's clearly controlling decisions in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), on which the Seventh Circuit extensively relied. *Apex Hosiery* clearly establishes that "the Sherman Act was directed only at those restraints whose evil consequences are derived from the suppression of competition in the interstate market,

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[3] It is apparent from the face of the Complaint that Respondents sought to eliminate abortion, that is, not to monopolize the market but to ban it. Similar protest has been targeted against numerous industries (Pet. App. A-17). This is a classic example of "decommodification" (Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987)) or an "inalienability rule." Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

so as 'to monopolize the supply, control its price or discriminate between its would-be purchasers.'" 310 U.S. at 511 (cit. omit.). In light of the clear consistency between *Apex Hosiery* and the decision below, *Council of Defense* creates no conflict that is worthy of this Court's consideration.

II. THE COURT OF APPEALS' ANTITRUST DECISION WAS CLEARLY RIGHT BECAUSE PETITIONERS FAILED TO ALLEGE THAT THE DEMONSTRATORS ENGAGE IN BUSINESS ACTIVITY IN THE COMMERCIAL MARKETPLACE, ARE COMMERCIAL COMPETITORS, HAVE ANY MARKET POWER, HAVE ANY COMMERCIAL MOTIVE, OR ENGAGE IN ANY COMMERCIAL CONSPIRACY.

Political activity intersects antitrust analysis at two distinct points. First, if the activity is essentially political, rather than commercial, the activity is not subject to the reach of the Sherman Act just because it affects business. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959); *Parker v. Brown*, 317 U.S. 341 (1943); *Apex Hosiery v. Leader*, 310 U.S. 469 (1940). Second, if commercial competitors employ political activities to influence any branch of government, their commercial activity—which might otherwise be subject to antitrust regulation—may be immunized. *Eastern Railroad v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). In this case, the political and non-commercial nature of Respondents' motive and activity serves to both absolve and immunize them.

Petitioners filed this antitrust case against political demonstrators who consider Petitioners' abortion business to be inherently evil and, therefore, seek to suppress it through political protest. The court of appeals focused on the intent and legislative history of the Sherman Act and concluded that it was not meant to "outlaw any contract, combination or conspiracy that restrains trade."

968 F.2d at 617. "Congress did not intend to reach every activity that might affect business" (*Id.* at 620) and the Sherman Act was "intended to prevent business competitors from making restraining arrangements for their own economic advantage." *Id.* at 621. The court concluded that "[d]efendants are not involved in business, and have no ability to concentrate economic power." *Id.* As the district court succinctly put it, the antitrust laws were not intended to apply to a case "which involves political opponents, not commercial competitors, and political objectives, not marketplace goals." 765 F.Supp. at 941.

The absence of commercial competition and marketplace goals is apparent on the face of the Complaint. The substance of Petitioners' antitrust claim is contained in ¶¶ 1, 2, 11, 13, 79-93. They allege that there is an "agreement" between Respondents to "restrain interstate trade" and that their activities have restrained trade (¶ 81); that the agreement and activities have "an anticompetitive effect" (¶ 82); that abortion clinics have been "damaged" by reason of the activities (¶ 83); that the activities force clinics out of business and increase costs (¶¶ 86-87); that the activities make it "more difficult for women to obtain abortions" (¶ 88); that abortion clinics "are less able to compete with other facilities offering the same or similar services" (¶ 89); that the activities "interfere with the on-going business and contractual relations" (¶ 90); and that these violate Petitioners' rights to be free of restraints of trade (¶ 93).[4] These say no more than that anti-abortion protests have affected the abortion industry.

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[4] Petitioners' contention that the "lower courts agreed that the conspirators' goal was to lessen competition" is false. No evidentiary hearings were held in the lower courts, and no findings of fact were made. Petitioners' Appendix at D-3 shows that the district court was merely describing the Complaint as alleging that Respondent Wojnar's activities "were . . . intended to . . . lessen competition by putting them out of business."

While it is clear on the face of the Complaint that the parties are "competitors," their competition is ideological. No facts are well pled that indicate that Respondents are engaged in business, that the parties are commercial competitors, that Respondents have employed any commercial means to suppress Petitioners' business, or that Respondents are engaged in any commercial conspiracy that is cognizable under the antitrust laws. The Complaint alleges that Respondents engage in a wide variety of activities, including "block[ing] ingress and egress to clinics," "invad[ing] clinics and damaged property," and trespass (¶ 2). Each of these activities may have an impact on the business of the clinics. But that does not mean that the activities have an "anti-competitive effect" within the meaning of the antitrust laws. "Anti-competitive" is a term of art which assumes commercial activity within the market. No allegation is made, or can be, that Respondents are manufacturers, purchasers, suppliers, retailers, or dealers, or that the parties are engaged in any horizontal or vertical relationship. The antitrust laws, however, are concerned about eliminations of commercial, not ideological, rivalry. In order for there to be "competition," there must be competitors, and in order for there to be "competitors," they must be rivals in the business. R. Bork, *The Antitrust Paradox* 49 (1978).[5] The only "marketplace" in which the parties are jointly involved is the "marketplace of ideas." *Schachar v. American Academy of Ophthalmology*, 870 F.2d 397, 400 (7th Cir. 1989). Commercial, and not ideological, competition is the subject of the Sherman Act, as is clear from even a passing reference to basic antitrust precedents.[6] As a matter of law, these allega-

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[5] "Competition is inherently a process in which rivals seek to exclude one another." Bork at 49. Competition involves the "effectiveness of rivalry in the general marketplace." Bork at 340.

[6] *See e.g., United States v. General Motors Corp.*, 384 U.S. 127, 146 (1966) ("where businessmen concert their actions in order to deprive others of access to merchandise which the latter want to

tions, therefore, fail to state a claim under the antitrust laws.

The court of appeals' decision that an antitrust defendant must have a commercial motive or means of action is supported by substantial caselaw. The seminal case is *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), involving a sit-down strike, where this Court held that the Sherman Act was "directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions. . . ." *Id.* at 493. *Apex Hosiery* made clear, "The Sherman Act was not enacted . . . to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to monopolize the supply, control its price, or discriminate between its would-be purchasers.'" *Id.* at 512. Moreover, in *Missouri v. NOW*, 620 F.2d 1301 (3th Cir.), *cert. denied*, 449 U.S. 842 (1980), the Eighth Circuit held that "it was competitors in commerce that Senator Sherman had in mind as the concern of his bill" and "the activities that were meant to be covered are competitive activities by competitors with some self-enhancement motivation . . . ." *Id.* at 1309. The court found that NOW's boycott for ratification of the ERA was "further afield from the central focus of the Sher-

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sell to the public, we need not inquire into the economic motivations underlying their conduct."); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959) ("The Court in *Apex* recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives."); *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 553 (1944) (Act "aimed at combinations of business and capital organized to suppress commercial competition.").

man Act" than the railroad activities in *Noerr*. *Id.* at 1312. Likewise, in *Henry v. First Nat'l Bank of Clarksdale*, 595 U.S. F.2d 291 (5th Cir. 1979), *cert. denied sub. nom., Claiborne Hardware Co. v. Henry*, 444 U.S. 1074 (1980), the court held that state antitrust laws could not be used to enjoin boycotts intended to achieve political results. *Id.* at 303-304. (*Henry* derived from the same factual situation as *Claiborne Hardware*, 458 U.S. at 890 n.5.) Numerous cases support the same proposition.[7]

Petitioners' Complaint cannot survive on the allegation that Respondents sell books or tapes or obtain voluntary contributions (¶ 100). The clear purpose of the sale of books and tapes is educational, and the gathering and expenditure of funds and resources to publicize political views are clearly protected by the First Amendment. *Riley v. Nat'l Fed. of the Blind*, 488 U.S. 781 (1988); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Murdoch v. Pennsylvania*, 319 U.S. 105, 110-111 (1943) ("But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise.").

Petitioners' reliance on ¶ 2 of their Complaint to save their case from dismissal fails. It states in relevant part:

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[7]*Parker v. Brown*, 317 U.S. 341, 351 (1943) (Sherman Act "prevented only 'business combinations'"); *Allied Int'l, Inc. v. Int'l Longshoreman's Assn.*, 640 F.2d 1368, 1380-81 (1st Cir. 1981), *aff'd on other grounds*, 456 U.S. 212 (1982); *Council for Employment and Economic Energy Use v. WHDH Corp.*, 580 F.2d 9 (1st Cir. 1978), *cert. denied*, 440 U.S. 945 (1979); *Franklin Music Co. v. Am. Broadcasting Companies*, 616 F.2d 528, 556 (3d Cir. 1979) (Sloviter, J., concurring); *Proctor v. General Conference of Seventh-Day Adventists*, 651 F. Supp. 1505 (N.D.Ill. 1986); *Barr v. National Right to Life Committee*, 1981-2 Trade Cases ¶ 64,315 (M.D.Fla. 1981); *Miller & Son Pav. Co. v. Wrightstown Tp. Civ. Assn.*, 443 F. Supp. 1268, 1271 (E.D.Pa. 1978) ("Congress intended its proscription to be limited to commercial transaction. . . The political nature of the Defendants' activities in this case . . . is . . . fatal to the Plaintiffs' antitrust claim.").

> defendants and their co-conspirators have . . . established competing pregnancy testing and counseling facilities in the vicinities of the clinics, sometimes in the same buildings where clinics are located, homes for pregnant women and, on information and belief, prenatal and delivery services, foster homes and private adoption agencies.

The district court found this to be the "sole allegation in the complaint of the commercial nature of defendants' activities" but held that it was not a sufficiently "plain statement" under FRCP 8(a) to state a claim. 765 F.Supp. at 940-41 n.1. Even accepting the allegations of ¶ 2 as true, they beg the question: while the parties may be ideological or political "competitors," no well pled facts are present that they are commercial competitors. Petitioners are required to plead an antitrust conspiracy with specificity. *Associated General Contractors v. Carpenters*, 459 U.S. 519, 528 n.17 (1983). The Complaint alleges that Randall Terry "runs a pregnancy testing and counseling center in Binghamton, New York . . ." (¶ 11) and that Conrad Wojnar "runs a number of anti-abortion women's medical clinics in the Chicago area and is the director of the Des Plaines Pro-Life Women's Center." (¶ 13) No allegation is made that Terry's "center" or Wojnar's "clinics" are engaged in any commercial or business related competition, that these centers "compete" with the Petitioners in any other sense than ideologically or politically, that these "centers" have any effect on business or commerce, that these "centers" have any anti-competitive effect on the business of abortion clinics, or that Terry's "center" or Wojnar's "clinic" has any impact on any local, state, or national market. These allegations, in short, are insufficient to state a claim for relief under the antitrust laws. Should this Court adopt Petitioners' construction that the Sherman Act applies to every non-commercial, political protest merely because

of the effect on business, the federal courts will be very busy indeed.[8]

III. THERE IS NO CONFLICT IN THE CIRCUITS ON THE COURT OF APPEALS' HOLDING THAT RICO REQUIRES THAT EITHER THE ENTERPRISE OR THE PREDICATE ACT BE ECONOMICALLY MOTIVATED.

Petitioners' contention that decision below conflicts with the Third Circuit's decision in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), is illusory. The court below held that "RICO requires either an economically motivated enterprise or economically motivated predicate acts." 968 F.2d at 614. The Third Circuit did not address that question. Instead, it looked at the separate issue of whether extortion under the Hobbs Act requires an economic benefit or motivation. The Third Circuit cited *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979), for the unremarkable and quite different proposition that "a person may violate the Hobbs Act without *himself* receiving the benefits of his coercive actions." 868 F.2d at 1350 (emphasis added). That is not the issue addressed by the court below.

Petitioners' claim is even more illusory that the decision below conflicts with the Eighth Circuit's decisions in *United States v. Clark*, 646 F.2d 1259 (8th Cir. 1981), or *United States v. Ellison*, 793 F.d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986). Their casual refer-

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[8] The judgment below may also be affirmed on the alternative ground that the Respondents are immune from antitrust liability under *Noerr-Pennington*. The right to petition is not limited to lobbying the legislative branch. As the First Amendment states, it is "the right . . . to petition the Government for a redress of grievances." Political protest is traditionally viewed as part and parcel of the right to petition. *Brown v. Louisiana*, 383 U.S. 131 (1966). The Eighth Circuit stated in *Missouri v. NOW*, 620 F.2d at 1317, "the right to petition is of such importance that it is not improper interference even when exercised by way of a boycott."

ence to these cases is particularly telling. The Eighth Circuit's seminal RICO case, involving bribery by Arkansas county judges, was *United States v. Anderson*, 626 F.2d 1358 (1980). The key RICO issue was the breadth of the "enterprise" concept. The *Anderson* court adopted a somewhat limited definition of "enterprise," requiring more than simply an association in fact, and held that "enterprise" includes "only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts. . . ." *Id.* at 1372. Subsequently, *Clark* also involved bribery by a Arkansas county judge, which, by its very nature, had an economic motive. The *Clark* court held that "enterprise" included the office of county judge and rejected the contention that "enterprise" was limited to private business organizations. 646 F.2d at 1264-65 & n.11 (noting that *Anderson* did not conflict). The *Clark* court did not address the question of economic motive in the enterprise or predicate act, the issue addressed here by the court below.

Finally, *Ellison* involved a leader of a paramilitary, white supremacist organization (CSA) involved in two predicate acts of arson. Ellison contended that the Government failed to prove "that there was any connection between one of the two arsons charged in the RICO count and any interest of CSA as an enterprise." 703 F.2d at 949. Following this Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985), the Eighth Circuit rejected Ellison's claim that the Government had to prove that the racketeering activity "benefitted the enterprise" and required the Government to prove "only that the predicate acts *affected* the enterprise." 793 F.2d at 950 (emphasis in original) (citing *United States v. Cauble*, 706 F.2d 1322, 1332-33 n.24 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984)). Although the Eighth Circuit found "no direct financial benefit to CSA," it did

sustain the finding that the arsons "affected" the enterprise and benefitted individual members. *Id.* The case did not involve the issue of economic motive and the court had no reason to consider it.

As such, no conflict exists, much less a conflict that is worthy of this Court's consideration. Clearly, the issue has not received the necessary consideration by the lower federal courts that calls for this Court's review.[9]

IV. THE COURT OF APPEALS WAS CLEARLY RIGHT IN HOLDING THAT RICO REQUIRES THAT THE PREDICATE ACT OR THE ENTERPRISE MUST BE ECONOMICALLY MOTIVATED.

Petitioners object to the holding of the court of appeals that "RICO requires either an economically motivated enterprise or economically motivated predicate acts." 968 F.2d at 614. Yet, the court of appeals relied on a clear, consistent series of cases. *United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985); *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983); *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983).

In claiming that the court of appeals' decision "substantially deviates" from the Second Circuit's decisions, the Petitioners conspicuously fail to cite Judge Friendly's seminal opinion in *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983). *Ivic* involved a conspiracy by Croatian

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[9] Petitioners pled a RICO § 1962(a) claim, alleging that Respondents "invested" voluntary donations they received from supporters into their alleged enterprises. The district court dismissed this claim, holding that donations received were not income "derived directly or indirectly, from a pattern of racketeering activity." 765 F. Supp. at 623. The court of appeals affirmed, holding that the Petitioners could not sustain a "but for" test. 968 F.2d at 625. Because Petitioners make no mention of their § 1962(a) claim in their Petition, they have necessarily waived it. Rule 14.1(a).

nationalists to kill or injure a Croation journalist and politician. The court rejected a RICO § 1962(d) count because the enterprise "was neither claimed nor shown to have any mercenary motive" (or economic motivation or financial purpose) because the goal was to advance Croatian independence. 700 F.2d at 59 & n.5, 60-61, 65. Shortly thereafter, the Second Circuit decided that *Ivic* did not absolve another group of Croatian nationalists of RICO liability when the enterprise "perpetrated an extensive international extortion scheme using the United States and foreign mails." *United States v. Bagaric*, 706 F.2d 42, 46, 49 (1983), *cert. denied*, 464 U.S. 840 (1983). When the *Bagaric* defendants adopted an extreme interpretation of *Ivic*—that the "economic motive of the enterpirse must surmount all others"—the *Bagaric* court rejected that construction, noting that *Ivic* did not require that "economic gain must be the sole motive of every RICO enterprise." *Id.* at 55, 53. Contrary to Petitioners' claim, the *Bagaric* court definitely did not conclude that the enterprise in *Bagaric* "lacked an economic motive" (Pet. at 9). Rather, the *Bagaric* court held that the prosecution may show financial purpose "through either the enterprise or the predicate acts of racketeering" (*Id.* at 56) and that the "core of the enterprise was the commission of more than fifty acts of the classic economic crime of extortion. . . ." *Id.* at 57-58.

Subsequently, in *United States v. Ferguson*, 758 F.2d 843, *cert. denied*, 474 U.S. 1032 (1985), involving a series of armed robberies and murders by the Black Liberation Army, the Second Circuit, following *Ivic*, held that there must be " '*some* financial purpose' . . . *either* to the criminal enterprise or the acts of racketeering." (cit. omit., emphasis in original). This was proven by the "economic crimes," including robbery, and the use

of the money obtained from the robbery in the enterpirse. *Id.* at 853.[10]

Accordingly, following *Ivic*, *Bagaric*, and *Ferguson*, the court below concluded that "the use of the term enterprise in §§ 1962(a) and (b) conveys a restriction to economic entities." 968 F.2d at 629. By so doing, as it noted, the court was not "adding elements to the offense, but merely fleshing out the definitions of those elements." *Id.* at 629. The Third Circuit in *McMonagle never mentioned* this line of cases and failed to address the precise issue whether the enterprise or predicate act under RICO must be economically motivated. No conflict exists that warrants this Court's review.

V. THE COURT OF APPEALS' RICO DECISION CAN BE AFFIRMED ON THE ALTERNATIVE GROUND THAT NO COMMON LAW EXTORTION WAS PLED UNDER THE HOBBS ACT.

If this Court granted *certiorari*, the issue whether the RICO enterprise or predicate act must be economically motivated need not be decided, because no predicate act was properly pled. Extortion was not properly pled because Petitioners failed to plead that any Respondent took or obtained any property from Petitioners or their patients. Whether a predicate act is properly pleaded logically precedes the question whether a predicate act, validly pled, requires an economic motivation. Because no conflict exists in the circuits on the extortion issue, no RICO issue is raised in this case that is worthy of this Court's consideration.

Just last term, in *Evans v. United States*, 112 S.Ct. 1881 (1992), despite differences on other issues, all Justices of

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[10] There is no parallel allegation in this case that Respondents obtained any property from Petitioners (or the clinics, employees, or patients) or used any such property obtained from them in any enterprise.

this Court unanimously agreed that "extortion" under the Hobbs Act must be interpreted in light of its common law meaning. The Court held that Congress "intended to adopt" the common law meaning of extortion in the Hobbs Act. *Id.* at 1885. The Court emphasized that the Hobbs Act definition of extortion was derived from New York law, which defined extortion as "the obtaining of property from another . . . with his consent, induced by a wrongful use of force or fear . . . ," and from the Field Code, which defined extortion as "the obtaining of property from another, with his consent, induced by a wrongful use of force or fear. . . ." *Id.* at 1886 n.9. The Court also noted that, at common law, extortion was defined "as the corrupt taking or receipt of an unlawful fee. . . ." *Id.* at 1887 n.14.

The allegations of "extortion" in the Complaint disregard the common law requirement of "taking" or "obtaining." Petitioners alleged that the Respondents "did wrongfully use threatened or actual force, violence or fear to induce or attempt to induce the employees of affected clinics to *give up* their jobs; doctors involved with affected clinics to *give up* their economic right to practice medicine at the plaintiff clinics; patients of affected clinics to *give up* their right to obtain services at the plaintiff clinics; and prospective patients of clinics to *give up* their constitutional right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force." ¶ 98d (emphasis added). Respondents are alleged to "commit extortion by using threatened or actual force or fear to induce the Ladies Center's employees, doctors, patients, and prospective patients to *relinquish* their economic rights and property interests." (¶¶ 97-98 (emphasis added)).

Petitioners' Complaint failed to allege extortion within the meaning of the Hobbs Act, and thus as a predicate act of RICO, because no allegations were made that any Respondent "obtained," "took," or "received" any prop-

erty of the clinics, doctors, patients, or prospective patients. Petitioners alleged merely that the clinics, doctors, or patients were *deprived* of something. Extortion is a larceny-type offense, not a malicious destruction of property-type offense. Respondents were not alleged to have wanted to obtain, have, or take anything from the clinics, doctors, or patients, much less that any Respondent in fact obtained, took, or received any property from them. These allegations in the Complaint are insufficient, therefore, as a matter of law because the crime of extortion, like robbery and larceny, under the common law and under RICO, requires "the obtaining of property from another . . . ," as this Court recognized in *Evans v. United States*, 112 S.Ct. 1881 (1992).[11]

No conflict in the circuits is raised on this application of the Hobbs Act. Although this common law extortion argument was raised in the district court (R.336, p. 27) and in the court of appeals, neither the district court nor the court of appeals expressly addressed it, but assumed that extortion was properly pled. The court of appeals merely stated that "[t]he racketeering activity is extortion under the Hobbs Act . . ." and proceeded to address the district court's economic motive rationale. 968 F.2d at 623.

No pressing need is present in this case for the Court to resolve a conflict in the circuits on whether RICO contains an economic motive requirement. If this Court granted certiorari to address whether RICO contains an economic motive requirement, the Court could affirm the judgment of the court of appeals on the alternative rationale that no common law extortion within the meaning of the Hobbs Act or RICO was properly pled. This

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[11] *See People v. Ryan*, 232 N.Y. 234, 133 N.E. 572 (1921); 31A Am.Jur.2d *Extortion* § 42 (1989) (citing *People v. Squillante*, 18 Misc.2d 561, 185 N.Y.S.2d 357 (1959)); *People v. Whaley*, 6 Cow. 661, 663 (N.Y. 1853); Annot., *Exortion*, 135 A.L.R. 728, 732 (1941) (citing *People v. Griffin*, 2 Barb. 427 (N.Y. 1848)).

is a question that is more clearly presented on the face of the Complaint and more clearly resolved by this Court's precedents and the common law meaning of extortion, but it is an issue that does not require this Court's review at this time. Thus, whether RICO contains an economic motive requirement is not squarely presented in this appeal.

Moreover, this case is hardly the appropriate context to resolve a perceived conflict in the circuits as to whether RICO contains an economic motive requirement. It was hardly the purpose of Congress in enacting RICO to address demonstrations against abortion clinics. The facts are highly unusual and not typical of the economic crimes to which RICO was directed. They do not provide an appropriate factual basis to resolve any supposed conflict on an economic motive requirement under RICO.[12]

VI. THE COURT OF APPEALS' DECISION CAN BE AFFIRMED ON THE ALTERNATIVE GROUND THAT THE PETITIONERS FAILED TO PLEAD RICO AND ANTITRUST CLAIMS WITH SPECIFICITY WHEN THE COMPLAINT TOUCHES A BROAD RANGE OF FIRST AMENDMENT RIGHTS AND POLITICAL ACTIVITIES.

In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), this Court unanimously threw out overbroad conspiracy judgments against civil rights boycotters and demonstrators.[13] The Court held:

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[12] To avoid duplication, Respondents incorporate by reference the additional grounds for denying the Petition raised in the Briefs in Opposition filed by Respondents Randall A. Terry, Project Life, Operation Rescue, John P. Ryan and the Pro-Life Direct Action League.

[13] In *Claiborne*, a local chapter of the NAACP organized a boycott of white merchants and enforced the boycott by several means, including a number of acts of violence directed primarily at blacks not honoring the boycott, such as the firing of gunshots into their homes (on at least three occasions), slashing of tires, throwing a

> "[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group possessed unlawful goals and that the individual held a specific intent to further those illegal aims. 'In this sensitive field, the state may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." ' ".

Id. at 920 (cit. omit.). The First Amendment requires "precision of regulation." *Id.* at 921.

> A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply be reference to the ephemeral consequences of relatively few violent acts.

Id. at 933. Here, no such specific allegations of antitrust or RICO violations, or conspiracies, are contained in the Complaint, nor is the relief sought so narrowly tailored.

First Amendment expression permeates the activities of Respondents. Although Petitioners portray Respondents as forming one monolithic entity, engaged in one common activity ("trespass, extortion, and vandalism"), Respondents use many different methods and widely diverse styles to suppress abortion on demand and to communicate to the public their opposition to abortion policy in this country. The centerpiece of the Complaint is Joseph Scheidler's manual on protest activities, *Closed: 99 Ways to Stop Abortion* (1985) (¶¶28-29, 77; R.109) [hereinafter *Closed*]. The activities alleged in the Complaint include sidewalk counseling, picketing, press conferences, leafletting, demonstrations and counter-

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brick through a windshield of a car, stealing whiskey purchased from a white merchant, and placing threatening phone calls. *Claiborne*, 458 U.S. at 902-06.

demonstrations, "blitzes," rallies, marches, advertising, burials of dead unborn children and religious services, blockades, and sit-ins. ¶¶ 2, 11, 35, 38, 40, 48-50, 55-56, 59-60, 73, 98(j), 125.[14]

The court of appeals' comment that "the complaint does not attempt to bar all anti-abortion activities" ignored the sweep of the Complaint on its face and in its prayers for relief. 968 F.2d at 616. Indeed, the Complaint is directed indiscriminately at the Respondents' "actions" and is thus overbroad. It is this overbreadth Respondents assail as a violation of the First Amendment. Respondents do not argue that "violence, criminal trespass, and vandalism are protected by the First Amendment." *Id.* at 621.

Rather, the Complaint was properly dismissed because Petitioners failed to make any distinction between legal or illegal activity when they sought injunctive relief aimed at enjoining Respondents both "*from carrying out a concerted effort* to drive women's health centers . . . out of business" and from "*using unlawful means* to drive women's health centers out of business." ¶ 93 (emphasis added). As this Court pointed out in *Claiborne*, "the term 'concerted action' encompasses unlawful conspiracies and constitutionally protected assemblies." 458 U.S. at 888. *See also*, Complaint ¶¶ 1, 26, 41. Petitioners' Complaint

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[14] Most, if not all, of these activities are protected under the First Amendment free speech and press clauses. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940) (proselytizing in public places); *City of Houston, Texas v. Hill*, 482 U.S. 451 (1987) (verbal challenges to activities of another); *DeBartolo v. Florida Gulf Coast Bldg. & Const.*, 485 U.S. 568 (1988) (union's hand-billing against businesses in shopping mall); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) (distribution of literature); *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (gathering to march, sing, and chant); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (same). Legislation that would attempt to regulate such activities must be "narrowly tailored" as to time, place and manner. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

focused on the *impact* on access to abortion—which can be caused by picketing, leafletting, or sit-ins—rather than the legality of the expressive conduct under antitrust laws, RICO, or the First Amendment. Similarly, Respondents were indiscriminately alleged to commit "extortion" merely because their activity allegedly prevented women from having abortions, deterred women from soliciting abortion clinics, or induced personnel to stop doing abortions. (¶ 98(d)). The allegations of damage, and the declaratory relief sought, were broadly and indiscriminately targeted at "the actions" of the Respondents (¶ 83-93). These "actions" were deemed illegal because they allegedly invoke "fear" or "intimidation" among patients or clinic personnel (¶ 97). The RICO allegations were targeted at Respondents' "activities" (¶ 105). Likewise, the pendent state claim was vaguely directed at "the unlawful acts described above" (¶ 117).

Although Petitioners asserted that the objective of driving abortion clinics out of business is *per se* illegal (¶ 93), the use of protest to influence merchants and their business is squarely protected by the First Amendment. *DeBartolo v. Fla. Gulf Coast Bldg.*, 485 U.S. 568, 576 (1988) (union handbilling against businesses in shopping mall); *Thornhill v. Alabama*, 310 U.S. 88, 99 (1940) (picketing intended "to induce the customers not to patronize the employer."). Likewise, Petitioners charged that Respondents created an "intimidating" climate outside of abortion clinics (¶¶ 19, 56, 91, 97-98), thereby interfering with abortion clinic business, but picketing and handbilling are squarely protected by the First Amendment (*Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965) and "[s]peech does not lose its protected character, however, simply because it may embarrass others or coerce them into action." *Claiborne Hardware*, 458 U.S. at 910.[15]

[15] *See also, Claiborne Hardware*, 458 U.S. at 921 ("To the extent that the court's judgment rests on the ground that 'many' black

Petitioners charged that Respondents are part of a "conspiracy" to shut down abortion businesses but "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). Even if Petitioners could charge that some of the alleged co-conspirators had engaged in assault or battery, "the right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *Claiborne Hardware*, 458 U.S. at 908, 925 n.68.[16]

Because the Complaint touches clear First Amendment activity, the allegations are subject to a heightened pleading burden, which Petitioners did not sustain

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citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and traduction,' it is flatly inconsistent with the First Amendment."); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("The claim that the expressions were intended to exercise a coercive impact on respondent [a realtor] does not remove them from the reach of the First Amendment."); *Watts v. United States*, 394 U.S. 705, 708 (1969) ("[t]he language of the political arena . . . is often vituperative, abusive, and inexact"); *Cox. v. Louisiana*, 379 U.S. 536, 551-52 (1965) (" 'a function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger' " (cit. omit.); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("profound national commitment to the people that debate on public issues should be uninhibited, robust and wide open"); *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[16] Petitioners have abused the "chameleon-like" character of conspiracy law that Justice Jackson criticized in *Krulewitch v. United States*, 336 U.S. 440, 447-49 (1949), and it should not be allowed to persist when the Complaint, on its face, touches First Amendment activity.

> [I]n any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.

Franchise Realty v. S.F. Loc. Joint Exec. Bd., 542 F.2d 1076, 1082-83 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977). *See generally*, P. Areeda, Antitrust Law ¶ 203.4b (1982 Supp.). This Court "has consistently recognized the sensitivity of First Amendment guarantees to the threat of harassing litigation, and has erected barriers to safeguard those guarantees." *Franchise Realty*, 542 F.2d at 1082. Likewise, the courts uniformly conclude "that the cost to society of permitting some unprotected speech to go unpunished was outweighed by the danger that protected speech might be deterred by an overly broad prohibition." *Herzbrun v. Milwaukee County*, 504 F.2d 1189, 1197 (7th Cir. 1974) (Stevens, J., concurring). Petitioners attempted exactly what *Claiborne Hardware* said cannot be done: Respondents' collective efforts "cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts." 458 U.S. at 933.

Petitioners must allege *with precision* the exact conduct of Respondents that has no First Amendment protection and is subject to challenge under the antitrust laws or RICO. *Claiborne Hardware*, 458 U.S. at 921. Because Petitioners could not, or would not, meet this basic requirement—even in their Second Amended Complaint filed after four years of discovery and after a review of thousands of pages of documents produced and many depositions—their complaint was properly dismissed in its entirety.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT S. HARLIB
105 W. Madison St.
Suite 300
Chicago, IL 60602
(312) 236-6605

THOMAS BREJCHA *
ABRAMSON & FOX
One East Wacker Drive 38th Fl.
Chicago, IL 60601
(312) 644-8500

CLARKE D. FORSYTHE
PAUL BENJAMIN LINTON
KEVIN J. TODD
AMERICANS UNITED FOR LIFE
343 S. Dearborn St. #1804
Chicago, IL 60604
(312) 786-9494
Counsel for Respondents

December 23, 1992

* Counsel of Record

APPENDIX

ЧИТАЛЬНИК

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 86-C-7888

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions, DELAWARE WOMEN'S HEALTH ORGANIZATION, INC., and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Plaintiffs,

v.

JOSEPH M. SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE ACTION LEAGUE, INCL., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE, and OPERATION RESCUE,

Defendants.

SECOND AMENDED CLASS ACTION COMPLAINT

NATURE OF THE ACTION

1. This is a civil action pursuant to section 16 of the Clayton Act, 15 U.S.C. Section 26, and section one of the Sherman Antitrust Act, 15 U.S.C. Section 1; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. Section 1962; and state law. Plain-

tiffs seek declaratory and injunctive relief and damages from defendants who have conspired, among themselves and with others, to drive women's health centers that perform abortions out of business through a pattern of concerted, unlawful activity.

2. In furtherance of their conspiracy, defendants and their co-conspirators have, inter alia, engaged in extortion against, threatened and intimidated clinic personnel and patients; intruded upon the confidential relationship between and invaded the privacy of, the clinics' personnel and patients; trespassed on clinic property, invaded clinics and damaged clinic equipment; blocked ingress and egress to clinics; destroyed clinic advertising; coordinated telephone campaigns to tie up clinic lines; set up appointments under false pretenses to keep legitimate patients from being able to make appointments, to cause clinics loss of income and to gain access to clinics; interfered directly with clinics' business relations, including but not limited to relations with patients, personnel, lessors, medical laboratories and other providers of goods and services; and established competing pregnancy testing and counseling facilities in the vicinities of the clinics, sometimes in the same buildings where clinics are located, homes for pregnant women and, on information and belief, prenatal and delivery services, foster homes and private adoption agencies.

3. The National Organization for Women ("NOW") sues on behalf of itself, its women members who use or may use the services of women's health centers that perform abortions, and other women who use or may use the services of such centers. The Delaware Women's Health Organization ("DWHO") and the Summit Women's Health Organization, Inc. ("Summit") sue on behalf of themselves and all other similarly-situated clinics performing abortions that defendants seek to drive out of business through a pattern of concerted, unlawful activity.

JURISDICTION

4. This Court has jurisdiction of this action pursuant to 28 U.S.C. Sections 1331 and 1337. Jurisdiction is additionally conferred by 15 U.S.C. Sections 15 and 25 and by 18 U.S.C. Section 1964. Jurisdiction over the state law claims is conferred by the doctrine of pendent jurisdiction. Plaintiffs' prayers for declaratory relief are authorized by 28 U.S.C. Section 2201.

PLAINTIFFS

5. NOW is a nationwide, non-profit organization with over 200,000 members dedicated to advancing and protecting the legal rights of women. Since its founding in 1966, NOW has had a special, on-going concern for the rights of women to reproductive freedom. Currently, NOW is engaged in a wide variety of efforts at the local, state, and national levels to ensure that women continue to have access to safe, economical abortion and family planning services. As part of NOW's Campaign for Women's Lives, NOW members escort patients at women's health centers, such as the named plaintiff clinics, DWHO and Summit, as well as at other clinics, including the Ladies Center, Inc. in Pensacola, Florida, to help protect them from harassment and intimidation by defendants and others. NOW is incorporated, and has its principal place of business in Washington, D.C.

6. DWHO is a Florida corporation with its principal place of business in Wilmington, Delaware. DWHO operates a women's health center that provides abortions, counseling to help patients explore alternatives to abortion, and a variety of gynecological services such as pelvic examinations, Pap tests, breast cancer screening, birth control counseling, pregnancy testing, and patient education. DWHO was the first out-patient clinic in Delaware of this type. From its inception in 1977 until 1983, it was the only such clinic in Delaware.

7. Summit is a partnership with its principal place of business in Milwaukee, Wisconsin. Summit operates a women's health center that is affiliated with DWHO, which also provides abortions, counseling to help patients explore alternatives to abortion, and a variety of gynecological services, such as pelvic examinations, Pap tests, breast cancer screening, birth control counseling, pregnancy testing, and patient education.

8. Clinics such as DWHO and Summit provide safe, low cost abortion services. Approximately three out of four abortions in the United States are preformed [*sic*] at clinics such as DWHO and Summit. A first trimester abortion performed at such clinics costs approximately two to five times less than the same procedure at a hospital.

DEFENDANTS

9. Joseph M. Scheidler is a resident of Chicago, Illinois, and has been the director of defendant Pro-Life Action League, Inc. at all times relevant to the lawsuit.

10. John Patrick Ryan is a resident of St. Louis, Missouri, and was the director of defendant Pro-Life Direct Action League, Inc. until September 25, 1987. He has consented to suit in the Northern District of Illinois.

11. Randall A. Terry is a resident of Windsor, New York. He runs a pregnancy testing and counseling center in Binghamton, New York, and is the Executive Director of Project Life and the national organizer of Operation Rescue. He has engaged in an illegal conspiracy with defendants and others in the Northern District of Illinois, and he has given workshops and speeches, held press conferences and taken other action in the Northern District of Illinois in furtherance of the illegal conspiracy alleged herein.

12. Andrew Scholberg is a resident of the Northern District of Illinois and has been the assistant director of

defendant Pro-Life Action League, Inc. since February, 1988. Before that he was the director of the Life and Family Center in St. Cloud, Minnesota.

13. Conrad Wojnar is a resident of the Northern District of Illinois. Wojnar runs a number of anti-abortion women's medical clinics in the Chicago area and is the director of the Des Plaines Pro-Life Women's Center.

14. Timothy Murphy is a resident of the Northern District of Illinois. Murphy has been a paid employee of defendant Pro-Life Action League, Inc. since September 1988 and worked as a volunteer for PLAL prior to that date.

15. Monica Migliorino is the director of Citizens for Life in Milwaukee, Wisconsin. She has engaged in an illegal conspiracy with defendants and others in the Northern District of Illinois and has taken action in this district, described in greater detail below, in furtherance of the illegal conspiracy alleged herein.

16. Vital-Med Laboratories, Inc. ("Vital-Med") is an Illinois corporation with its principal place of business in the Northern District of Illinois. Since 1984, Vital-Med or its predecessor has provided pathology testing and other services to DWHO, Summit and their affiliated clinics. Vital-Med is owned by the Washington National Insurance Company and Dr. Samuel C. Shih, in equal shares.

17. Pro-Life Action League, Inc. ("PLAL") is an Illinois corporation with its principal place of business in Chicago, Illinois. Its business consists of disrupting and closing women's health centers that perform abortions through the use of illegal activity.

18. Pro-Life Direct Action League, Inc. ("PDAL") is a Missouri corporation with its principal place of business in St. Louis, Missouri. Its business consists of disrupting and closing women's health centers that perform

abortions through the use of illegal activity. The PDAL has consented to suit in the Northern District of Illinois.

19. Operation Rescue ("OR") is an organization comprised of individuals and organizations including PLAL, PDAL, Scheidler, Ryan, Terry, Scholberg, Murphy and others. Its principal offices are located in Binghamton, New York. Its business consists of disrupting and closing women's health centers that perform abortions through the use of illegal activity. Through its leader Randall Terry and other agents and co-conspirators, OR has engaged in the illegal conspiracy complained of herein with its co-defendants and others in the Northern District of Illinois and has taken action in furtherance of the illegal conspiracy in this district.

20. Project Life, Inc. (the "Project") is an organization with its principal place of business in Binghamton, New York. Through its officer Randall Terry and other agents and co-conspirators, the Project has engaged in the illegal conspiracy complained of herein with defendants and others in the Northern District of Illinois and has taken action in furtherance of the illegal conspiracy in this district.

CLASS ALLEGATIONS

21. Plaintiffs DWHO and Summit bring this action on behalf of themselves and all other similarly situated women's health centers in the United States which perform abortions. The prerequisites of Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure are satisfied. The class is so numerous that joinder of all its members is impracticable; there are numerous questions of law or fact common to the class; the claims of the named plaintiffs are typical of the claims of the class; and the named plaintiffs will fairly and adequately protect the interests of the class. Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declar-

atory relief and damages with respect to the class as a whole.

22. Plaintiff NOW brings this action on behalf of itself, its women members who use or may use the services of women's health centers that perform abortions, and all other women who use or may use the services of such health centers. NOW's women members who use or may use the services of women's health centers that perform abortions have standing in their own right, the interests NOW seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual NOW members in the lawsuit. Furthermore, there is a close relationship between the interests of NOW and the interests of other women who are not NOW members but who use or may use the services of women's health centers that perform abortions, and the ability of such women to represent themselves is limited. Finally, in the case of both the class of NOW's women members who use or may use the services of women's health centers that perform abortions and the class of women who are not NOW members but who use or may use the services of such health centers, the class is so numerous that joinder of all of its members is impracticable; there are numerous questions of law or fact common to the class; NOW will fairly and adequately protect the interests of the class; and the defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

INTERSTATE COMMERCE

23. Clinics such as DWHO and Summit are engaged in interstate commerce.

24. A substantial portion of DWHO's patients come from states other than Delaware and a substantial portion of Summit's patients come from states other than Wisconsin.

25. A substantial portion of medical supplies and equipment purchased by DWHO and Summit comes from out-of-state sources.

26. Since at least 1984, defendants have agreed and conspired among themselves and with others to drive every clinic in the United States, such as DWHO and Summit, out of business.

27. In pursuit of their goal to drive every clinic out of business, defendants have traveled throughout the country, used inter-state telephone lines and U.S. mail services for the purposes of engaging in, or encouraging others to participate in, unlawful, concerted action, including repeated acts of trespass, extortion and vandalism directed at women's health centers such as DWHO and Summit.

28. Defendant Scheidler has distributed throughout the United States a manual, *Closed: 99 Ways to Stop Abortion*, outlining methods intended to be used to interfere with and stop women's health centers such as DWHO and Summit from operating. Defendant Scheilder's manual encourages the use of unlawful activities and methods to drive women's health centers such as DWHO and Summit out of business.

29. Defendant Scheidler has traveled throughout the country training other persons to use the methods outlined in *Closed: 99 Ways to Stop Abortion* and encouraging them to drive women's health centers such as DWHO and Summit out of business.

30. Defendants Scheidler, Ryan, Terry, Scholberg, Murphy and Migliorino have traveled throughout the country leading efforts to shut down women's health cen-

ters such as DWHO and Summit and encouraging the use of unlawful methods to do so.

31. Defendants Scheidler, Scholberg and Murphy use defendant PLAL to carry out their unlawful objectives and activities.

32. Defendant Ryan has attempted to disrupt unlawfully the operations of numerous facilities performing abortions throughout the nation, resulting in Ryan's more than 300 arrests.

33. Defendant Ryan has conducted workshops and training sessions throughout the country designed to encourage other persons to disrupt unlawfully the operations of women's health centers that perform abortions.

34. Defendant Ryan has used defendant PDAL to carry out his unlawful objectives and activities.

35. Defendant Terry has traveled throughout the country encouraging, organizing and training other persons to use unlawful methods to close women's health centers that provide abortion, including blockades of the centers designed to stop ingress and egress.

36. Defendant Terry uses defendants OR and the Project to carry out his unlawful objectives and activities.

37. Defendants Murphy and Migliorino have shipped stolen laboratory specimens in interstate commerce and used interstate telephone and mail communications to help organize actions designed to intimidate and harass clinics by focusing attention on the stolen specimens in at least six states. Defendant Migliorino has also traveled across state lines for the purpose of accomplishing the theft and the local actions. The actions of Murphy, Migliorino, Scheidler and others have resulted in cancellation of a contract between defendant Vital-Med, the Illinois laboratory from which the specimens were stolen, and DWHO and Summit in Delaware and Wisconsin respectively.

FORMATION OF THE PRO-LIFE ACTION NETWORK

38. On May 10-12, 1984, the first National Pro-Life Conference, entitled "Action for Life," was held in Ft. Lauderdale, Florida. Defendant Scheidler presented a conference workshop on " Effective Confrontation: A "How To' of Picketing, Leafletting, Sit-ins and Blitzes." He also spoke at a "Ready for Action" rally. As part of their training, approximately 200 conference participants were taken by bus from the convention to the Women's Awareness Clinic, a clinic that offers abortion services. They surrounded the clinic, blocking all entrances and exits.

39. The following month, in June 1984, defendants Scheidler, Ryan, PLAL and PDAL and others met in Kansas City, Missouri, to formulate a six-month plan of national activities. The plan included so-called "blitzes" of abortion clinics in which anti-abortionists were to enter the clinics to disrupt their business, to gain media attention and to create a threatening and intimidating atmosphere at the clinics. The plan was designed to close down as many abortion clinics across the country as possible.

40. In April 1985, Action for Life II, the Second Annual Pro-Life Activist Conference was held in Appleton, Wisconsin. At this conference, participants named their coalition of "activist" anti-abortion groups the Pro-Life Action Network ("PLAN"). PLAN adopted an agenda of nationally-coordinated activities, including sit-ins, to shut down the abortion industry and pledged to create "a year of pain and fear" for anyone receiving or performing an abortion. Conference participants were greeted with a marque at the conference site that said "Have a Blast." Many wore firecrackers, to symbolize dynamite, as lapel pins. Defendants Scheidler, Ryan, PLAL and PDAL participated in this national meeting.

41. On March 25, 1986, defendants Scheidler, Ryan, PLAL and PDAL and others led a workshop in Pensacola, Florida, designed to encourage local residents to join them in taking unlawful, concerted action to drive women's health centers out of business.

42. On March 26, 1986, the said defendants and others went to the Ladies Center of Pensacola, Inc., a clinic in Pensacola, Florida which performs abortions, to lead an effort to shut it down. During the course of their efforts, four people, including Joan Andrews and John Burt, stormed the clinic. John Burt injured Linda Taggert, the clinic administrator, and Georgia Wilde, then-president of the Escambia county chapter of plaintiff NOW. Andrews ransacked a medical procedures room, destroying surgical supplies. Both Andrews and Burt had to be subdued by the police. Both had their bail revoked after they returned to the clinic following their arrests. Both were convicted on criminal charges as a result of their actions.

43. In April 1986, defendant Scheidler traveled to Delaware to organize and train persons to use his methods for shutting down women's health centers such as DWHO and to galvanize them into action.

44. On April 11, 1986, in furtherance of the nationwide effort to close down women's health centers that perform abortions, defendant Scheidler unlawfully entered DWHO. Scheidler told the then-clinic administrator, Cathy Connor, that he had come to "case the place" because he and his followers intended to force DWHO to close. He stated that he and others intended to make Delaware the first abortion-free state in the nation. He threatened Conner with reprisals should she refuse to quit her job. Conner subsequently left her job with DWHO in the spring of 1987.

45. On April 12, 1986, defendant Scheidler threatened that anti-abortionists "will get rid of [clinics such as

DWHO]. I proclaim that Delaware is going to become the first state in the union to be free of abortion facilities."

46. Defendant Scheidler was arrested and charged with criminal trespass and harassment on April 12, 1986, as a result of his actions at DWHO the previous day. He was subsequently convicted and fined.

47. Later in April 1986, defendants Scheidler, Ryan, PLAL and PDAL participated as organizers and workshop presenters at PLAN's third annual conference in St. Louis, Missouri, sponsored by defendant PDAL. Conference participants adopted goals for the year which included changing their language to refer to "sit-ins" as "rescue missions." The 1986-1987 PLAN Agenda called for "Days of Rescue" in June, August and December 1986, and January and April 1987. Field training for conference participants in rescue missions took place on Saturday, April 19, when 107 were arrested for blocking access to the Regency Park Center, a clinic in St. Louis that performs abortions.

48. On November 28 and 29, 1986, defendants Scheidler and Ryan returned to Pensacola to demonstrate at the Ladies Center and at the home of Judge William Anderson, who had sentenced Joan Andrews for her role in the invasion of the Ladies Center in March, 1986. Defendant Terry also traveled to Pensacola for the demonstrations.

49. On Friday, November 28, several hundred antiabortionists demonstrated at the Ladies Center for some four hours. Police had to order the demonstrators to let cars through their picket line and onto the Ladies Center property. Seven people were arrested for refusing to move from in front of a truck. After the arrests, the remaining demonstrators moved into the street and stopped traffic. The Escambia County Sheriff's Department had to be called in to help the Pensacola Police Department maintain order.

50. On Saturday, November 29, Scheidler and others addressed a rally followed by a march to the home of Judge Anderson where approximately one hundred protesters gathered. Scheidler went onto the porch of Judge Anderson's home and knocked on the door, but no one answered. Some demonstrators then refused to leave the porch and others left their protest signs behind. When officers began making arrests, Scheidler hurriedly left as the demonstration erupted into a confrontation with police. One officer was knocked to the ground, another was grabbed from behind by demonstrators attempting to aid people who had been arrested in escaping from the police. An officer's radio was taken from him by a demonstrator, and demonstrators surrounded a police cruiser in which one of those arrested had been placed by officers. Once again the city police requested assistance in crowd control from the Escambia County Sheriff's Department when demonstrators refused to move away from the surrounded cruiser. Eight people were arrested.

51. On December 14, 1986, PLAN held a mini-conference in St. Louis, Missouri, attended by defendants Ryan and Scholberg, among others. Defendant Scheidler sent a tape and received a copy of Scholberg's notes from the meeting, including the goals and guidelines adopted. The mini-conference was held in large part to discuss their concerns over public perception of the incidents November 28 and 29 in Pensacola. Scholberg and Ryan reported to the group that Scheidler might want to distance himself from PLAN for a while.

52. The participants agreed unanimously that one of their goals was to close down abortion clinics. They set out guidelines to ensure better control of PLAN demonstrations in order to improve public perception of the activist anti-abortion movement, improve media relations and promote an impression of unity in their movement. Ryan was named interim leader of PLAN, and it was agreed that some kind of leadership council, includ-

ing Ryan and Scheidler, should be on the agenda at the next PLAN Convention April 29 to May 2, 1987. The PLAN leaders agreed to meet again on January 21, 1987 in Washington, D.C.

53. From April 30 to May 2, 1987, all of the defendants except Wojnar, Migliorino and Vital-Med took part in the annual PLAN convention in Atlanta, Georgia, including field training on Saturday, May 2, 1987. Defendants Scheidler, Ryan, Terry and Scholberg were featured as speakers at the convention. Defendant Murphy attended. Seventy-nine people, including defendant Ryan, were arrested during the field training at the Women's Health Center. A news release from defendants before the Conference stated that they would try to stop abortions at Atlanta clinics "by any and all means available. No abortion clinic will be spared." At a news conference on Friday of the convention, defendant Scheidler said tactics such as blocking entrances of clinics and abrasive confrontations with women seeking abortions were necessary "to take their business away from [the providers]."

54. At the 1987 PLAN convention, a leadership council of five regional representatives was elected including defendants Scheidler, Ryan, Terry along with Andrew Burnett from Portland, Oregon, and Peter Lennox from Atlanta, Georgia. Burnett had been arrested at the 1986 PLAN convention field training; Lennox had attended the PLAN mini-conference in December 1986; and both Burnett and Lennox were featured speakers at the 1987 PLAN convention. The council met during the convention and met again on August 21, 1987 in Washington, D.C.

55. From August 25 through 27, 1988, defendant PLAL sponsored the 1988 PLAN convention in Chicago, Illinois. Defendants Scheidler, Scholberg, Murphy, Migliorino, Terry, PLAL, OR and the Project took part. Scholberg, Murphy and Migliorino were speakers. Defendant Terry also spoke to the convention on the activi-

ties of OR and was featured at a PLAN news conference on Friday, August 26 encouraging others to take part in planned field training the next day. On Saturday, August 27, conference participants, including defendants Scheidler, Murphy and others, took part in demonstrations at two clinics in Chicago. At one of the clinics, demonstrators used a tactic which defendant Scheidler called a "lock and block." Scheidler described it as a new method requiring fewer people to close a clinic. Demonstrators poured glue into the locks of the clinic's doors and locked a Kryptonite bicycle lock on the door handles. Defendant Murphy and another demonstrator also used bicycle locks, positioned around Murphy's neck and the other demonstrator's ankle, to attach themselves to a solid block of concrete which they had placed in front of the clinic door. Sixteen people, including defendant Murphy, were arrested in connection with the blockade of the clinic.

CARRYING OUT PLAN'S AGENDA: OPERATION RESCUE

56. Beginning no later than 1986, the PLAN Defendants and others in PLAN conspired to organize massive sit-ins and clinic invasions at abortion clinics nationwide. Their goal was to block access to the clinics in order to prevent patients and staff from entering or exiting and to create a threatening, intimidating atmosphere and a public image of danger in connection with the clinics. Defendant Terry presented the proposal to the other defendants in November 1986 in Pensacola, Florida.

57. Over a period of months, the plan to blockade clinics, organized under the name Operation Rescue, was discussed and revised. Following a visit between defendants Scheidler and Terry in New York in March 1987, the plan was finalized and brochures were printed showing defendants Scheidler, Ryan, Scholberg, PLAL and PDAL among the co-sponsors of OR.

58. The revised plan for OR was presented at the 1987 PLAN convention. The 1987-88 direct action schedule which came out of the convention included OR actions from April 30 through May 7, 1988, directed at clinics in the New York City area. Field training was scheduled for Thanksgiving 1987 in St. Louis, but at the PLAN leadership council meeting August 21, 1987 in Washington, D.C., defendants and the other organizers decided to change the location to the northeastern United States.

59. On November 28, 1987, PLAN organizers and others affiliated with them took part in an OR field training in Cherry Hill, New Jersey. Some 300 people from over a dozen states blocked access to the Cherry Hill Women's Center. Two hundred eleven were arrested.

60. From May 2 through May 6, 1988, in violation of both state and federal restraining orders, OR conducted four days of clinic blockades in New York City and Hicksville, Long Island. Arrests totalled 503 on Monday, May 2; 423 on Tuesday, May 3; 401 on Thursday, May 5; and 320 on Friday, May 6. Defendant Scheidler served as an official marshal during OR in New York. Defendants Scheidler and Scholberg were among those arrested. Scheidler was reported to have said he was there to see how the New York action was done, since they expected to do an OR action in Chicago as well.

61. On July 19, 1988, a series of OR actions began in Atlanta, Georgia. More than 1,200 participants were arrested during the nearly four months that the actions continued. Felony charges were brought against defendant Terry for inciting police assault and clinic trespass. At least 30 OR participants in Atlanta were arrested on felony charges: 8 for assaulting a police officer; 6 for terrorist acts; and 16 for false imprisonment.

62. In early October 1988, PLAN ended the OR actions in Atlanta as it geared up for a National Day of Rescue on October 29, 1988. For the National Day of Rescue, defendants Terry, Scheidler, Scholberg, Murphy, PLAL

and PDAL, and other PLAN participants organized simultaneous OR actions in some 40 cities around this country and in Toronto, Canada, blockading clinics and prompting nearly 2,500 arrests.

63. In addition to the foregoing nationally-coordinated OR actions, local OR actions have taken place continuously since the November 1987 field training in Cherry Hill, New Jersey. More than 9,700 participants have been arrested in OR actions since that time.

THEFT OF FETAL REMAINS

64. Beginning sometime before January 1988, defendants Scheidler, Scholberg, Murphy, Migliorino, Wojnar, PLAL and others, including one or more employees of Vital-Med, conspired to steal fetal remains located in Vital-Med's research laboratory in Northbrook, Illinois. DWHO, Summit and other clinics had sent the specimens to Vital-Med for pathology testing. Defendants conspired to use the specimens as part of their drive to disrupt the operations of health clinics generally, and the operations of clinics affiliated with plaintiffs DWHO and Summit specifically, by keeping women away from the clinics through threats and intimidation and by interfering with the clinics' relations with the laboratory, lessors and others.

65. For more than six years, Vital-Med had provided services to DWHO, Summit and their affiliated clinics. Pursuant to their contract, Vital-Med performed gross and microscopic pathology testing on the fetal specimens and provided sanitary disposal of the remains.

66. In approximately January 1988, defendant Wojnar received a call from a Vital-Med employee. The employee discussed with Wojnar how fetal remains could be stolen from the laboratory. Following this call, Wojnar discussed the matter with Murphy and, over a period of approximately ten months, continuing until approximately No-

vember 1988, Murphy, Migliorino and others, with the complicity of one or more employees of Vital-Med, stole some 4,000 specimens from the laboratory.

67. Murphy and Migliorino each made several trips to Vital-Med and coordinated the actions of other who went with them. They went onto Vital-Med's property and entered the laboratory building, either through a garage door or, on Sundays when that door was closed, through a side door which was left ajar. Then they would proceed to the loading dock, open sealed storage containers and remove fetal specimens from among other medical waste, and take them from the premises. On at least one occasion, an entire storage drum was stolen, using a hand cart. On one or more occasions, Vital-Med employees saw Murphy and Migliorino but did nothing to stop the thefts.

68. The fetal remains were stored initially at various co-conspirators' homes, including the homes of defendants Scheidler, Murphy, Migliorino, and Wojnar. The stolen storage drum was taken by Murphy to Scheidler's home, where it was stored for several weeks in a playhouse in Scheidler's backyard. Eventually a public storage facility was rented and the drum was moved there. Ultimately, after removing the fetal remains from the drum, Murphy deposited the drum with the remainder of the medical waste in an ordinary garbage dumpster in the Chicago area.

69. In the summer of 1988, Murphy, Migliorino and others sent some of the fetal remains to co-conspirators Frank Avila in Fort Wayne, Indiana; Lucy M. O'Keefe in Chapel Hill, North Carolina; Charlene Crommett in Fargo, North Dakota; Dee Becker, chairwoman of the Delaware Pro-Life Coalition in Wilmington, Delaware, and anti-abortionists in Tallahassee, Florida. Many of the shipments were made by United Parcel Service with the return address of PLAL. Others were shipped by private automobile.

70. In North Carolina, 157 fetuses were shipped by a network of anti-abortionists to O'Keefe, who kept them in her kitchen. O'Keefe made arrangements for a highly-publicized funeral mass and burial on August 23, 1988. In news stories about the incident, defendant Scheidler was widely quoted as stating that the fetuses had been found at a lab in Chicago and that they were "individually packaged and labelled . . . with the names of the mothers, doctors, dates and places the abortions were performed."

71. In Milwaukee, Wisconsin, Migliorino arranged a September 10, 1988 ceremony and burial for a reported 1,200 fetuses. Migliorino's group and 9 others issued a news release before the events stating that they intended to release the names of the Milwaukee clinics from which the fetal remains had been taken. Defendant Scheidler again confirmed publicly that the fetuses came from Vital-Med. In published news reports, Migliorino stated that 700 of the fetuses came from Summit and another Milwaukee clinic.

72. Migliorino shipped approximately 150 fetuses from Milwaukee to Fargo, North Dakota for burial ceremonies arranged by Crommett. In a press account, Migliorino stated that the fetuses came from the Fargo Women's Health Organization, an affiliate of DWHO and Summit, and had been shipped originally by the Fargo clinic to a suburban area of Chicago where anti-abortionists obtained them.

73. In Chicago, Fort Wayne, Wilmington and Tallahassee, similar actions took place. Fetal remains stolen from the lab in Northbrook were sent from the Chicago area, given local burial amidst a media campaign designed to generate negative publicity for women's health clinics generally and for affiliates of DWMO and Summit, specifically.

74. The public statements of defendant Scheidler and the local co-conspirators implied that the clinics were not

following proper procedures in disposing of medical waste. They carried the clear threat to suppliers, landlords, doctors and others who provide goods and services to the clinics, that they too could be targeted by defendants for theft and other illegal activity as well as harassment and public controversy.

75. The actions of defendants and their co-conspirators also presented an obvious threat to women who have used, or might in the future consider using the clinics, that their privacy would be invaded and the confidentiality of their treatment breached by having their names and personal, medical information revealed publicly.

76. Vital-Med has now informed the management company for DWHO, Summit and their affiliates that effective January 1, 1989, it would no longer accept fetal specimens from the clinics for analysis. Plaintiffs DWHO and Summit are informed that Vital-Med had been forced by a company referred to as "Washington National" to terminate this relationship with the clinics. On information and belief, the company to which Vital-Med referred is Washington National Insurance Corporation or one of its operating subsidiaries, which owns a 50% interest in Vital-Med, and whose counsel, Craig Edwards, and board member, Edward Cottrell, serve as Secretary and board member, respectively, of Vital-Med.

77. At approximately the same time that she was working on the plan to steal and then publicize the stolen fetal remains, Migliorino also was engaged in a campaign to force the new lessor of Summit to breach its lease with the clinic. Following techniques outlined in defendant Scheidler's book, Migliorino sent letters directly to the landlord and to other tenants, threatening disruption and harassment if Summit were allowed to move in to the building.

78. Summit's landlord, Jefferson Associates, Ltd., has notified the clinic that it will breach their lease and re-

fuse to let the clinic move into the new premises. The landlord, through Joel S. Lee, the President of its General Partner, Van Buren Management, Inc., has also advised Summit that it was forced by "Washington National" to terminate the lease with the clinic. On information and belief, the Washington National to which the landlord referred is Washington National Development Corporation or one of the operating subsidiaries of Washington National Insurance Company, which holds a mortgage on the premises which were subject to the Summit lease. Washington National's in-house counsel, Craig Edwards, has confirmed to plaintiffs' counsel that he spoke with Joel Lee about the lease, but has stated that he told Lee that Washington National would not withhold its approval of the lease. Summit's current lease has expired. Summit is continuing as a month-to-month tenant at its present location. Summit does not have a new location into which to move.

COUNT I: SHERMAN ANTI-TRUST ACT

79. Count I is brought against defendants Scheidler, Ryan, Terry, Scholberg, Murphy, Wojnar, Migliorino, PLAL, PDAL, OR, the Project (the "PLAN Defendants"), and Vital-Med.

80. Plaintiffs restate the allegations set forth in paragraphs 1 through 78.

81. The agreement among and the activities of the PLAN Defendants and Vital-Med are designed to, and threaten to, restrain interstate trade.

82. The agreement among and the activities of the PLAN Defendants and Vital-Med have, and threaten to have, an anti-competitive effect.

83. Women's health centers throughout the United States, including DWHO and Summit, have been damaged, and are threatened with damage by reason of the actions of the PLAN Defendants and Vital-Med.

84. Women, including NOW members, who seek abortions and other services offered by women's health centers have been damaged, and are threatened with damage, by reason of the PLAN Defendants' and Vital-Med's actions.

85. The purpose of the PLAN Defendants' and Vital-Med's actions is to force all clinics that perform abortions out of business and to eliminate the choice of abortion for women who are pregnant.

86. The PLAN Defendants' and Vital-Med's actions have forced, and threaten to force, women's health centers that perform abortions out of business.

87. The PLAN Defendants' and Vital-Med's actions have increased the cost, and threaten to increase the cost, of having an abortion by compelling women's health clinics to incur, and to raise their charges to cover, the expense of increased security, higher insurance premiums, higher rents, and mounting legal fees, among other things.

88. The PLAN Defendants' and Vital-Med's actions have made it, and threaten to make it, more difficult for women to obtain abortions, birth control, fertility treatment, pregnancy testing, counseling and other gynecological services.

89. Women's health centers whose cost [*sic*] increase are less able to compete with other facilities offering the same or similar services.

90. The PLAN Defendants' and Vital-Med's actions have been designed to interfere with, and threaten to interfere with the on-going business and contractual relationships women's health centers have with patients, laboratories, lessors, doctors, employees, and others.

91. The PLAN Defendants' and Vital-Med's actions have increased, and threaten to increase, the risk of medical complications faced by women who seek abortions

by forcing such women to postpone abortions or by exposing such women to a pattern of harassing and intimidating conduct designed to create stress and to stop them forcibly from exercising their choice to have an abortion.

92. NOW has been frustrated, and is threatened with being frustrated, by the defendants' actions in its efforts to ensure that women continue to have access to safe, economical abortions and family planning services. NOW has had to devote significant resources to identify and counteract the defendants' actions.

93. The PLAN Defendants' and Vital-Med's actions violate the rights of NOW, DWHO and Summit and all similarly-situated women's health centers, and their current and prospective patients, to be free of restraints and threatened restraints of trade under section one of the Sherman Anti-Trust Act, 15 U.S.C. Section 1.

WHEREFORE, plaintiffs pray that this Court:

(1.) Certify this case as a plaintiffs' class action;

(2.) Declare that the actions of PLAN Defendants and Vital-Med have violated the rights of NOW, DWHO and Summit and all similarly-situated women's health centers, and their current and prospective patients, to be free of restraints of trade under section one of the Sherman Anti-Trust Act, 15 U.S.C. 1;

(3.) Enjoin the PLAN Defendants and Vital-Med from carrying out a concerted effort to drive women's health centers such as DWHO and Summit out of business;

(4.) Enjoin the PLAN Defendants and Vital-Med from using unlawful means to drive women's health centers such as DWHO and Summit out of business;

(5.) Award DWHO, Summit and all similarly situated women's health centers treble damages from the PLAN Defendants and Vital-Med;

(6.) Grant plaintiffs their costs in this action and reasonable attorneys' fees; and

(7.) Grant such other and further relief as the Court deems just and proper.

COUNT II: RICO—SECTION 1962(a)

94. Count II is brought against the defendants Scheidler, Terry, Scholberg, Murphy, PLAL, OR and the Project (the "RICO Defendants") by plaintiffs DWHO and Summit and the class they represent, which reallege paragraphs 1 through 78.

95. PLAN is an enterprise under 18 U.S.C. Section 1961 (4) engaged in and affecting interstate commerce. PLAN is an association of individuals and groups with common purposes, including driving all clinics that provide abortion services out of business and preventing the plaintiff clinics from conducting business. PLAN is wholly distinct from the pattern of racketeering activity engaged in by each defendant.

96. PLAL, OR and the Project are each enterprises under 18 U.S.C. Section 1961 (4) engaged in and affecting interstate commerce. The common purpose of each association is to drive clinics that provide abortion services out of business. PLAL, OR and Project Life are distinct from the pattern of racketeering activity engaged in by each defendant.

97. Defendants Scheidler, Scholberg, Murphy, Wojnar, PLAL, Terry, OR and the Project, each a person under 18 U.S.C. Section 1961 (3), receive income, directly or indirectly, from a pattern of racketeering activity that includes predicate offenses in violation of 18 U.S.C. Section 1951 (the "Hobbs Act"). Defendants conspired to, attempted to or did wrongfully use threatened or actual force, violence or fear to induce or attempt to induce the employees of affected clinics to give up their jobs; doctors involved with affected clinics to give up their economic

right to practice medicine at the plaintiff clinics; patients of affected clinics to give up their right to obtain services at the plaintiff clinics; and prospective patients of clinics to give up their constitutional right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force.

98. Specifically, the RICO Defendants have committed the following predicate acts among others:

a. Attempts, conspiracies to commit and commission of extortion against the Women's Awareness Clinic, its employees, doctors, patients, and prospective patients in Fort Lauderdale, Florida, by persons attending the 1984 national Pro-Life Conference, at which defendant Scheidler presented a workshop;

b. Conspiracy to commit extortion by defendant Scheidler and others associated with him as part of their participation in the 1985 PLAN Conference against anyone receiving or performing an abortion;

c. Conspiracy to commit extortion by persons attending a March 25, 1986, workshop let [*sic*] by defendants Scheidler and others associated with defendants in Pensacola, Florida, which organized persons to attempt or commit extortion to drive the Ladies Center and similar women's health centers out of business;

d. Attempted extortion and the commission of physical violence against persons on March 26, 1986, when John Burt physically injured the president of the local NOW chapter and others in the course of efforts by defendants Scheidler, PLAL, and others associated with them to shut down the Ladies Center by committing extortion. John Burt wrongfully threatened and used actual force to induce the employees of affected clinics to give up their jobs; doctors involved with affected clinics to give up their economic right to practice medicine at the plaintiff clinics; patients of affected clinics to give up their right to obtain services at the plaintiff clinics; and prospective

patients of clinics to give up their constitutional right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force;

e. The destruction of medical supplies by Joan Andrews on March 26, 1986 in the course of efforts by defendants Scheidler, PLAL, and others associated with them to shut down the Ladies Center and in furtherance of a plan to commit extortion by using threatened or actual force or fear to induce the Ladies Center's employees, doctors, patients, and prospective patients to relinquish their economic rights and property interests;

f. Attempts, conspiracies to commit and commission of extortion against the Regency Park Center, its employees, doctors, patients, and prospective patients in St. Louis, Missouri by persons attending the 1986 PLAN Conference, in which defendants participated as organizers and workshop presenters;

g. Attempted extortion by defendant Scheidler on April 11, 1986, when Scheidler threatened DWHO's clinic administrator with reprisals if she refused to quit her job at the clinic in order to induce the clinic administrator to quit that job;

h. Attempts, conspiracies to commit and commission of extortion against the Women's Health Center, its employees, doctors, patients, and prospective patients in Atlanta, Georgia by persons attending the 1987 PLAN Conference, in which defendants took part;

i. Attempts, conspiracies to commit and commission of extortion at a series of OR actions, including:

(1) A "field training" action on November 28, 1987 and continuous actions since then directed at the Cherry Hill Women's Center in Cherry Hill, New Jersey, in which Terry, OR, the Project, and others associated with them have blocked access to the clinic, among other actions;

(2) Four days of blocking the entry to clinics in New York City and Hicksville, Long Island from May 2 to May 6, 1988. Terry was an organizer and Scheidler served as official marshal for the New York action. Terry, Scheidler and other PLAL employees were among those arrested at the New York actions;

(3) Nearly four months of actions, beginning July 19, 1988, directed against clinics in Atlanta, Georgia. More than 1200 participants in these actions, including Terry and others associated with him, were arrested for charges including inciting police assault, assaulting a police officer, terrorist acts, false imprisonment and trespass;

(4) A 40-city National Day of Rescue on October 29, 1988, organized by defendants Terry, Scheidler, PLAL, OR, the Project and others associated with them to block access to clinics to force and attempt to force clinics to close;

j. Attempts, conspiracies to commit and commission of extortion in 1988 by defendants Scheidler, Murphy, Migliorino, Wojnar, PLAL, and others associated with them against patients and prospective patients of clinics affiliated with plaintiffs DWHO and Summit. Specifically, (i) Scheidler, Wojnar, Murphy, Migliorino, PLAL and others associated with them conspired to steal and hide the fetuses, and (ii) Scheidler, Murphy, Migliorino, PLAL, and others (a) threatened to disclose confidential information about previous patients of these clinics, in connection with the theft of fetal remains from Vital-Med; and (b) publicized and conducted funeral masses and burials for the stolen fetuses. The said defendants committed the above acts in order to induce fear in prospective patients and thus force them to forego the right to decide where to seek medical services free from pressure by defendants and others;

k. Attempts and conspiracies to commit extortion by Scheidler, Murphy, Migliorino, Wojnar, PLAL, and others associated with them against doctors working with clinics affiliated with plaintiffs DWHO and Summit. Specifically, the said defendants and others affiliated with them (1) threatened to disclose, and in some cases did disclose the identity of these doctors, in connection with the theft of fetal remains from Vital-Med; and (2) conducted and publicized fetal funerals. The said defendants committed the above acts in order to induce fear in the doctors to force them to forego the economic benefits of their involvement with the clinics; and

l. Attempts and conspiracies to commit extortion by Scheidler, Murphy, Migliorino, Wojnar, PLAL, and others associated with them against clinics affiliated with plaintiffs DWHO and Summit. Specifically, the said defendants and others (1) illegally stole, hid and transported fetal specimens from Vital-Med in Northbrook, Illinois to Fargo, North Dakota, Ft. Wayne, Indiana, Raleigh, North Carolina, Wilmington, Delaware, and Milwaukee, Wisconsin; (2) threatened to disclose confidential information about patients and the identities of doctors in connection with the theft of fetal remains from Vital-Med; (3) publicized and conducted funeral masses and burials for the stolen fetuses. The said defendants and others affiliated with them committed the above acts to induce the clinics to fear the economic losses that would result both from the invasion of privacy of clinic patients and doctors and from negative publicity associated with the fetal funerals. Thus Scheidler, PLAL, and the others attempted and conspired to force the clinics to stop providing abortion services.

99. Each of the attempts and conspiracies to commit extortion obstructed, delayed, and/or affected interstate commerce insofar as it succeeded. Each of the successful conspiracies to commit or commissions of extortion, and the physical violence committed by John Burt and

Joan Andrews in furtherance of plans to commit extortion, obstructed, delayed and/or affected interstate commerce.

100. The income the PLAN Defendants receive from their pattern of racketeering activity includes contributions received by these defendants in support of their extortionate acts. Defendants Scheidler, Scholberg, Murphy and Terry also receive or have received salaries or other payments and benefits, including, in the cases of Scheidler, Scholberg and Murphy, the personal use of a car owned by PLAL, because of their involvement in the pattern of racketeering activity.

101. Defendants Scheidler, Scholberg, Murphy and PLAL used or invested, directly or indirectly, income received from a pattern of racketeering activity, or the proceeds from that income, to establish or operate PLAN and the PLAL.

102. Defendants Ryan and the PDAL used or invested, directly or indirectly, income received from a pattern of racketeering activity, or the proceeds from that income, to operate PLAN and the PDAL.

103. Defendants Terry, OR and the Project used or invested, directly or indirectly, income received from a pattern of racketeering activity, or the proceeds from that income to operate PLAN, OR and the Project.

104. Each defendant's violation of 18 U.S.C. Section 1962(a) has injured the business and/or property interests of the plaintiffs and the class members. The RICO Defendants' investment of income received from the pattern of racketeering activity or the proceeds therefrom has injured plaintiffs by furthering those illegal goals of PLAN, and/or PLAL, OR or the Project which involve extortionate and anticompetitive activities against abortion providers.

105. Specifically, the RICO Defendants' activities have decreased the business of, and/or increased the cost of

doing business at DWHO, Summit, and similarly-situated clinics. The RICO Defendants' activities have injured the plaintiff class of female NOW members and other women who have been unable to obtain abortion services, or whose choice of clinics that provide these services has been restricted, by depriving them of the right to choose freely between abortion providers in an unthreatened marketplace and to reap the economic and medical advantages of having that choice.

WHEREFORE, plaintiffs ask that this Court certify this case as a plaintiffs' class action; award plaintiffs DWHO and Summit treble damages, to be proved at trial, along with costs, attorneys' fees, and grant all other relief to which plaintiffs may be entiled.

COUNT III: RICO—SECTION 1962(c)

106. Count III is brought against the RICO Defendants and defendant Migliorino by plaintiffs DWHO and Summit and the class of clinics they represent, which reallege paragraphs 1 through 78, and 95 through 105.

107. Defendants Scheidler, Terry, Scholberg, Murphy and Migliorino, each persons under 18 U.S.C. Section 1961 (3), are associated with PLAN by virtue of their involvement in its annual conventions as speakers and in other capacities. Defendants Scheidler and Terry are also associated with PLAN by virtue of their positions on its leadership council.

108. Defendants PLAL, OR and the Project, each a person under 18 U.S.C. Section 1961 (3), are associated with PLAN and are constituent groups that comprise PLAN. In addition, they are associated with PLAN through the roles of their respective current or former directors, Scheidler and Terry, in PLAN.

109. Each RICO Defendant and Migliorino conducted and participated in PLAN's affairs through a pattern of racketeering activity. The predicate acts comprising the

pattern of racketeering activities include those acts described in paragraph 99 [*sic*] above. As a consequence of the pattern of racketeering activity, defendants Scheidler, Terry, Scholberg, Murphy, Wojnar and Migliorino, and through them PLAL, OR, and the Project have obtained and maintained significant roles in PLAN.

110. As a result of each defendant's violation of 18 U.S.C. Section 1968(c), plaintiffs have suffered the injuries described *supra* in paragraphs 104-105.

WHEREFORE, plaintiffs ask that this Court certify this case as a plaintiffs' class action, award plaintiffs DWHO and Summit treble damages, to be proved at trial, along with costs, attorneys' fees, and grant all other relief to which plaintiffs may be entitled.

COUNT IV: RICO—SECTION 1962(d)

111. Count IV is brought against the RICO Defendants by plaintiffs DWHO and Summit and the class of clinics which they represent, which reallege paragraphs 1 through 78, 95 through 105 and 107 through 110 above.

112. Defendants Scheidler, Scholberg, Murphy, and Terry conspired with each other and other persons to use the income they received from a pattern of racketeering activity, or the proceeds therefrom, to establish or operate PLAN, in violation of 18 U.S.C. 1962(d). Each of these defendants further agreed to the commission of the extortionate acts from which the above-mentioned income would derive.

113. Defendants Scheidler, Scholberg, Murphy, Migliorino, Terry and on information and belief, Wojnar agreed with each other and other persons to conduct and/or participate in the affairs of PLAN. Each of these defendants further agreed to the commission of extortionate acts through which each defendant would conduct and/or participate in PLAN's affairs in violation of 18 U.S.C. 1962(d).

114. As a direct result of defendants' conspiracy in violation of 18 U.S.C. section 1962(d), plaintiffs have been injured in their business and/or property, as alleged in paragraphs 104-105 above.

WHEREFORE, plaintiffs ask that the Court certify this case as a plaintiffs' class action, award plaintiffs DWHO and Summit treble damages, to be proved at trial, along with other costs, attorneys' fees, and all grant [*sic*] other relief to which plaintiffs may be entitled.

COUNT V: TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

115. Count V is brought against defendants Scheidler, Scholberg, Murphy, Migliorino, Wojnar and the PLAL by DWHO and Summit, on their own behalf and not on behalf of any class. Plaintiffs reallege paragraphs 1 through 78.

116. DWHO, Summit, the Fargo Women's Health Organization, Inc., the Fort Wayne Women's Health Organization, Inc., and the Raleigh Women's Health Organization, Inc. are among nine affiliated clinics (the "WHO Clinics"). The WHO clinics, through their management company, National Women's Health Organization, Inc., had a contract with Vital-Med to provide abortion-related and other pathology services to the clinics. Vital-Med provided services to Summit since 1982 and has had a contractual relationship since 1984. As recently as August 27, 1988, Vital-Med and the WHO clinics had agreed on a fee schedule which would govern their contractual relationship in the future.

117. Before defendants engaged in the unlawful acts described above, DWHO and Summit had an expectancy of a valid business relationship with Vital-Med. On information and belief, each defendant was aware of that expectancy.

118. During 1988, defendants schemed to steal and send fetal specimens from Chicago to Fargo, Ft. Wayne, Raleigh, Milwaukee and Wilmington. Defendants or their followers, who knew of Vital-Med's contract with the WHO clinics, agreed with one or more Vital-Med employees that the employee(s) assist the defendants in stealing the specimens. After stealing the fetal remains, the defendants shipped them to a variety of locations across the country, and told the press that the specimens were being taken "home" to be buried. Based on information provided by the defendants, newspapers named Vital-Med as the source of the specimens.

119. In the week of November 7, 1988, Vital-Med terminated its contract to provide abortion-related pathology services to the WHO clinics. Vital-Med simultaneously wrote to the National Women's Health Organization, Inc. that it enjoyed their working relationship and would continue to provide the clinics with services related to processing PAP smears.

120. Upon information and belief, each defendant intentionally, maliciously and without justification induced Vital-Med to terminate its business with the WHO clinics. Defendants' theft of the specimens was an illegal and improper act designed to induce Vital-Med's termination of its relationship with the WHO clinics.

121. Each defendant's interference with the plaintiff clinics' prospective economic advantage is improper and unjustified. Defendants have committed illegal acts in order to interfere with the plaintiff clinics' business expectancies.

122. As a result of defendants' tortious interference with the ongoing business relationship between the WHO clinics and Vital-Med, the WHO clinics have incurred and will incur damages in obtaining new sources for laboratory testing and medical waste disposal services.

WHEREFORE, plaintiffs ask that this Court award DWHO and Summit compensatory and punitive damages for defendants' tortious interference with their contracts with Vital-Med, costs, and all other relief to which they are entitled.

COUNT VI: TORTIOUS INTERFERENCE WITH EXISTING BUSINESS RELATIONSHIP

123. Count VI is brought against defendant Migliorino by Summit, on its own behalf, and not on behalf of any class. Summit realleges paragraphs 1 through 78.

124. On July 26, 1988, Summit entered into a lease with Jefferson Associates, Ltd. for space in the Jefferson Building to be used as a clinic in Milwaukee, Wisconsin.

125. Defendant Migliorino, who knew of Summit's lease of space in the Jefferson Building, sent a letter dated October 4, 1988 to other tenants in the Jefferson Building and businesses located in the area surrounding the building. This letter threatened controversy and conflicts with anti-abortion activists if Summit were allowed to enjoy the benefits of its lease. Specifically, Migliorino threatened weekly pickets and demonstrations, including sit-ins in the building lobby, chaining building doors closed and blocking doors with cars. She threatened that female business clients of other businesses would be suspected of going to the clinic and would be harassed by so-called sidewalk counselors. She also made reference to the press coverage of the stolen fetal remains and the fetal funeral in Milwaukee to demonstrate the lengths to which she and her associates would go to prevent Summit from operating its business.

126. Migliorino asked the other tenants and businesses to send letters of opposition to Joel S. Lee, President of Van Buren Management, Inc., the general partner of Jefferson Associates, Ltd. She stated that "Joel S. Lee, however, welcomes your protest on this matter and if

tenants are opposed, the mortgage lender *will not* approve the lease." (Emphasis in original.) Upon information and belief, the lender was Washington National Development Corporation, a subsidiary of Washington National Insurance Company.

127. Jefferson Associates, Ltd. has now informed Summit that Summit will not be allowed to move into the Jefferson Building pursuant to the lease. Defendant Migliorino has taken credit publicly for causing the landlord to breach the lease.

128. Migliorino intentionally and without justification induced Jefferson Associates, Ltd. to breach its contract with Summit. Her actions were an illegal and improper inducement of Jefferson Associates, Ltd.'s cancellation of the lease.

129. As a result of defendant's tortious conduct and Jefferson Associates, Ltd.'s resulting breach of contract, Summit has incurred and will incur damages in obtaining a lease for other premises.

WHEREFORE, plaintiffs ask that this Court award Summit damages for defendant's tortious interference with its contract with Jefferson Associates, Ltd., punitive damages, costs, and all other relief to which they are entitled.

COUNT VII: BREACH OF DUTY OF CONFIDENTIALITY

130. Count VII is brought against Vital-Med by DWHO and Summit, which reallege paragraphs 1 through 78.

131. Vital-Med knew that a doctor-patient relationship existed with regard to the fetal specimens sent by the plaintiff clinics to Vital-Med for testing and disposal, and that confidentiality was owed by the clinics and the doctors to the women who had abortions. Vital-Med had a duty

of confidentiality to the plaintiff clinics and the women whose fetal specimens were sent for pathology testing and disposal. Nevertheless, Vital-Med failed to establish and follow any security procedures to provide confidentiality regarding the names of the clinics, the doctors and the women who had abortions at DWHO, Summit and their affiliated clinics and to ensure proper sanitary disposal of the remains.

132. As a result of Vital-Med's tortious conduct, DWHO and Summit have incurred and will incur damages.

WHEREFORE, plaintiffs ask that this Court award DWHO and Summit damages, costs and all other relief to which they are entitled.

Respectfully submitted,

/s/ Fay Clayton
FAY CLAYTON, ESQ.
KAHN ROBINSON CURLEY & CLAYTON
200 West Adams Street
Suite 2701
Chicago, Illinois 60606

ALAN POLLACK, ESQ.
POLLACK & GREENE
950 Third Avenue
New York, New York 10022

PATRICIA IRELAND, ESQ.
KIM GANDY, ESQ.
NATIONAL ORGANIZATION FOR WOMEN
1000 16th Street, N.W.
Suite 700
Washington, D.C. 20036-5705

JUDI LAMBLE, ESQ.
SACHNOFF & WEAVER
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served the persons on the attached Service List, a true and correct copy of Plaintiffs' SECOND AMENDED COMPLAINT by mail, proper postage prepaid, first class, from a United States mail depository located at 200 West Adams Street, Suite 2701, Chicago, Illinois, this 22nd day of September, 1989.

/s/ Fay Clayton
FAY CLAYTON

Supreme Court, U.S.
FILED
DEC 23 1992
OFFICE OF THE CLERK

No. 92-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

JOSEPH SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, MONICA MIGLIARINO, VITAL-MED LABORATORIES, INC., PRO-LIFE, DIRECT ACTION LEAGUE, INC., PROJECT LIFE, and OPERATION RESCUE,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONSE OF RESPONDENT MONICA MIGLIARINO (MILLER) TO PETITION FOR WRIT OF CERTIORARI

Alexis I. Crow
Counsel of Record
John W. Whitehead
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, VA 22901
(804) 978-3888

Craig L. Parshall
THE RUTHERFORD INSTITUTE of WISCONSIN
N96 W18221 County Line Road
Suite 206
Menomonee Falls, WI 53051
(414) 251-9440

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QUESTION PRESENTED

Whether this Court should review a decision of the Seventh Circuit Court of Appeals which upheld the dismissal of Petitioners' Second Amended Complaint in that Petitioners failed to adequately allege under the Sherman Act and RICO any overriding economic motive for the actions of the pro-life activist Respondents.

RULE 29.1 STATEMENT

Respondent Monica Migliarino is an individual, and has no parent or subsidiary companies. The Petitioners have accurately listed the parties to this proceeding.

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No. 92-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

JOSEPH SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, MONICA MIGLIARINO, VITAL-MED LABORATORIES, INC., PRO-LIFE, DIRECT ACTION LEAGUE, INC., PROJECT LIFE, and OPERATION RESCUE,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONSE OF RESPONDENT MONICA MIGLIARINO (MILLER) TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below are adequately described in the Petition, however, the opinion of the Seventh Circuit Court of Appeals has been published at 968 F.2d 612.

STATEMENT OF JURISDICTION

The statement of jurisdiction is properly set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are properly set forth in the Petition for Certiorari.

STATEMENT OF THE CASE

Respondents take issue with Petitioners' STATEMENT OF THE CASE where it is stated that "the Complaint did not in any way implicate lawful speech or petitioning by persons opposed to abortions." (Petition for Certiorari, page 4).

As the Seventh Circuit Court of Appeals noted in the Appeal below, "Peaceful picketing, debate, meetings, prayers...are protected by the First Amendment." (Petition for Certiorari, App. A-6).

Respondent Monica Migliarino[1] was alleged to have "...threatened S.W.H.O.'s [Summit Women's Health Organization, Incorporated] future landlord and co-tenants" in a successful effort to block the move of S.W.H.O. abortion clinic to a new premises. (*Id.*, App. A-5).

Nevertheless, threats to merely continue social and political pressure by means of "picketing, debate, meetings, prayers..." clearly implicate the First Amendment. Plaintiffs' broadly drawn complaint does not exclude the implication that Respondent's "threats" were merely the expression of a commitment to continue protected First Amendment activity.

Petitioners' use of the terms "unlawful," "violent," (Id., page 3) "illegal," "tortious" and, perhaps most colorful of all,

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[1] Respondent Migliarino was married after being joined in this action, and her married name is Monica Miller. For purposes of continuity, she shall be referred to as "Migliarino."

"campaign of terrorism" (Id., page 4) and "campaign of criminal acts" (Id., page 5) belies the Petitioners' statement that, "This case is not about a women's right to abortion." Why else would Petitioners use such incendiary epithets for such benign conduct as offering burial rites for aborted babies? It would seem to be an obvious corollary that the more wrongful the Respondents' actions are made to appear, the more, thereby, Petitioners underscore the fact that the rights that the Respondents have allegedly denied are "women's reproductive rights," precisely those rights that the Plaintiff organization is "dedicated" to protect (Id., page 3). Petitioners' statements in this regard are self-serving at best.

Petitioners allege that "several [Respondents]...compete with Plaintiff clinics, and derive substantial income - in some cases hundreds of thousands of dollars a year - from their enterprises." (*Id.*, page 5). Yet Respondent Migliarino was never alleged to have derived any monetary benefits whatsoever for her pro-life activities.

SUMMARY OF ARGUMENT

The dismissal of the Plaintiffs' Second Amended Complaint was proper in that the Plaintiffs' Anti-trust Cause of Action under the Sherman Act failed adequately to allege a sufficient economic purpose on the part of the Respondents showing that the Respondents exerted market control, control of price or other discrimination between purchasers.

The Seventh Circuit decision did not exempt the Respondents because they were involved in a "social cause," but rather, because their motives were non-commercial in nature. Furthermore, the Seventh Circuit's decision adequately protected the First Amendment rights of social and moral activists from the reach of the Sherman Act.

The dismissal of the RICO counts was also proper and is in keeping with the holdings of the 2nd and 8th Circuits that the

actions of social and moral activists that are not primarily directed toward an economic goal do not fall under the proscription of RICO, and such a holding is further consistent with the intent and history of RICO and the definition of "enterprise" under RICO.

Further, the allegations by the Petitioners that the receipt of contributions by pro-life organizations and individuals satisfies the economic purpose requirement under RICO was properly rejected by the Seventh Circuit because of the lack of proximate causation between the receipt of contributions and the alleged wrongful activities of the Respondents.

Finally, the decision of the Seventh Circuit appropriately prevents the infringement of the First Amendment rights of pro-life protesters in that the severe remedies under RICO and the breadth of its reach would have a chilling effect on freedom of speech as well as freedom of association.

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT RIGHTLY REQUIRED AN ECONOMIC PURPOSE AS A PRECONDITION FOR RICO LIABILITY

A. THE "CONFLICT" AMONG THE CIRCUITS ENVISIONED BY THE PETITIONERS IS ILLUSORY.

Petitioners argue that the Seventh Circuit Opinion in this case is "inconsistent with Opinions of the 2nd and 8th Circuits" (Id., page 7). Quite the contrary, the Seventh Circuit concluded that RICO liability requires economic motive, first and foremost, because the concept of "enterprise" included in both 18 U.S.C. §1962(a) and §1962(c) presupposes that "for purposes of RICO, an enterprise must be directed toward an economic goal" (*United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988)).

The Seventh Circuit adopted the reasoning of the 8th Circuit reflected in *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980) that an"enterprise"under RICO includes:

> Only an association having an ascertainable structure which exists for the purpose of maintaining operations *directed toward an economic goal* that has an existence that can be defined apart from the commission of the predicated acts constituting the pattern of racketeering activity.

(Petition for Certiorari, App. A-27)(Emphasis added).

Likewise, in the Second Circuit, the term "enterprise" in §§1962(a)and(b) conveys a limitation to economic (as opposed to political or social) entities (*United States v. Ivic*, 700 F.2d 51, 61 (2nd Cir. 1983). In *United States v. Bagaric*, 706 F.2d 42, 56 (2nd Cir.), cert. denied, 464 U.S.840 (1983) the Court affirmed the ruling in *Ivic* that the Plaintiff must show an overriding financial purpose, but such a purpose may be shown either through the "enterprise" or the commission of the predicate racketeering acts.

The Seventh Circuit's Opinion in this case is wholly consistent with the Second and Eighth Circuits[2]. It is, admittedly, in stark contrast to, and in direct contradiction with the holding in the Third Circuit (*Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1349-40 (3rd Cir. 1989).

However, *McMonagle* is scant authority for the Petitioners' position because the Third Circuit in that case determined that since no economic motive is necessary under the Hobbs Act, no economic motive was thereby required when the Hobbs Act is used as a predicate under RICO. Thus the 3rd Circuit avoided

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[2] The Seventh Circuit decision was recently followed in *Webster v. Operation Rescue*, Case No. 91 C 20138, 1992 U.S. Dist. LEXIS 15488 (W.D.ILL. Oct. 9, 1992) involving RICO claims by the owner of an abortion clinic against protesters.

the determination of whether economic purpose was required under the RICO statute itself in its definition of "enterprise."

The requirement of an overriding economic direction of the enterprise in a RICO case is consistent with the legislative history and intent of RICO, as indicated in the next Section.

B. THE SEVENTH CIRCUIT DECISION IS CONSISTENT WITH THE INTENT AND HISTORY OF RICO.

This Court has indicated that the "...primary purpose of RICO is to cope with the infiltration of legitimate businesses" by organized crime. (*United States v. Turkette*, 452 U.S. 576, 591 (1981).

The concept of an economic enterprise is central to the RICO scheme. The "...essence of the [RICO] violation is the commission of those acts in connection with the conduct of an enterprise." (*Sedima S.T.R.L. v. Imrex Co.. Inc.*, 452 U.S. 576, 591 (1985)).

The term "enterprise" certainly "refers to the sort of entity in which funds can be invested in a property interest of some sort acquired, and hence the sort of entity which one joins to make money." (*United States v. Ivic*, 700 F.2d 51, 60 (2nd Cir. 1983).

The Statement of Findings in the preface to the Organized Crime Control Act of 1970, 84 Stat. 922-23 quoted by this Court in *Turkette*, 452 U.S. at 588-89 refers to the fact that "...organized crime activities in the United States weaken the stability of the nation's economic system, harm innocent investors and competing organizations, interferes with free competition, seriously burden interstate and foreign commerce..."

RICO was enacted, in its final form, in an effort to mitigate the effects of organized crime which drains exorbitant sums of money from the economy through exploitive action (*Senate Comm. on the Judiciary. Organized Crime Control Act of 1969*,

S. REP. No. 617, 91 St Cong., 1st Sess. (Statement of Finding and Purpose) (1969)).

The arsenal of punitive weapons contained in RICO were designed to destroy the otherwise invulnerable economic base of organized crime (Califa, *RICO Threatens Civil Liberties*, 43 Vand. Law Rev. 805 (1990)).

RICO was never intended, and therefore should not be applied, for use against respondents motivated to oppose abortion where the economic impact of their pro-life activities is only incidental and is not part of an overall scheme "directed toward an economic goal..." (*Anderson*, 626 F.2d at 1372).

C. ALLEGATIONS RELATING TO RECEIPT OF CONTRIBUTIONS BY PROTEST ENTITIES OR RELATING TO INCIDENTAL ECONOMIC IMPACT OF PROTESTORS' ACTIONS DO NOT SATISFY THE ECONOMIC PURPOSE REQUIREMENT OF RICO.

In argument before the Seventh Circuit the Petitioners contended that the receipt of contributions by some of the Respondents as result of their alleged illegal activities satisfied the economic purpose requirement as a prerequisite to RICO liability.

The Petitioners again revisit that argument in their Petition for the Writ of Certiorari by arguing that the economic element under RICO is satisfied by allegations of substantial salaries by some of the Respondents (funded by contributions) and by the Respondents' purpose to drive abortion clinics out of business and thereby impacting the national economy. (Petition for Writ of Certiorari, pages 10-11).

Petitioners' argument, that the fact that some Respondents received the benefits of supporting contributions as a result of their activities constitutes a sufficient economic purpose, relates specifically to the language of 18 U.S.C.§1962(a) which

provides in part that, "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity...to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise...".

Before the Seventh Circuit, this Respondent argued that there must be a relationship of "proximate causation" between the receipt of contributions and the alleged racketeering activities. Respondent argued that:

> First, the Nexus between an alleged profit motive (presumably by virtue of gaining the benefit of increased public contributions) and the alleged wrongful acts themselves is too remote and abstract to constitute a sufficient economic motive under RICO. The element of "proximate causation", in other words, is missing. Plaintiffs apparently recognize that in the Seventh Circuit there is a necessity of pleading a causal link between wrongful acts and the income received ...

(Brief of Appellee Monica Migliarino (Miller), page 22)

The Seventh Circuit adopted the "proximate causation" rule (Petition for Writ of Certiorari, App. A-23, 24) noting that this Court has adopted the proximate cause approach to RICO previously in *Holmes v. Securities Investor Protection Corp.*, ___ U.S.__, 112 S.Ct. 1311, 1318 (1992).

The Seventh Circuit appropriately concluded that:

> Based in part upon notions of proximate cause, we believe this alleged relationship between the defendants' criminal acts and their supporters voluntary contributions is simply too tenuous to satisfy the requirement of §1962(a).

(Petition for Certiorari, App. A-24).

This Court has likewise applied the concept of proximate causation to protest activities, holding that "while the state legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered." (*N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982); (see also *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 730 (1966) where the Court held that the permissible scope of remedies in protest and demonstration cases involving union activity "is strictly confined to the direct consequences of such [violent] conduct and does not include consequences resulting from associated peaceful union picketing or other union activity.").

Because this Court has consistently applied the concepts of proximate causation to rationally limit the reach of state and federal regulation applied to political or social protest movements, and has previously applied those concepts to the provisions of RICO, the granting of Certiorari in this case is unwarranted and unnecessary.

D. REQUIREMENTS OF ECONOMIC PURPOSE UNDER RICO ARE NECESSARY TO CIRCUMSCRIBE AND PROTECT FIRST AMENDMENT RIGHTS.

The rights protected by the First Amendment are profoundly important in our society. Califa, *RICO Threatens Civil Liberties*, 43 Vand.L.Rev. 805, 832 (1990). Free speech is a transcendent value and the harm resulting from the chilling of free speech is comparatively greater than the chilling of other activity. *Id.* Applying RICO and the antitrust laws to anti-abortion demonstrators threatens their right to participate in an "uninhibited, robust, and wide open debate" on issues of public importance. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Clearly the abortion issue has not been settled either in

the law or in the public mind, and ensuring free and open public debate on the subject is a matter of public importance. Faglioni, *Balancing First Amendment Rights of Abortion Protesters With the Rights of Their 'Victims'*, 48 Wash. & Lee L. Rev. 347 (1991).

The use of RICO and antitrust causes of action against demonstrators has been criticized as setting a dangerous precedent that allows business and government to inhibit groups wishing to exercise their First Amendment rights. Moretti, *Using Civil RICO to Battle Anti-Abortion Violence: Is the Last Weapon in the Arsenal a Sword of Damocles?*, 25 New Eng.L.Rev. 1363 (1991).

By the very breadth and punitive power of its provisions, RICO holds the potential for massive Constitutional infringement. Its provisions have been described as both "powerful and expansive." *U.S. v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 23 (2nd Cir. 1989).

Referring to RICO, one scholar indicates that "the potential for litigation abuse in this area is manifest, and its impact could chill pro-abortion or anti-abortion demonstrations" (referring to *Northeast Women's Center. Inc. v. McMonagle, Supra*), Blakey and Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God-Is This* the End of RICO?", 43 Vand. Law Rev. 851, 975 (1990).

Scholars describe the types of cases that have been brought under RICO as weapons of political coercion, as having included claims:

> Against pro-life protestors to recover the costs incurred by the municipality to arrest protestors who participated in sit-ins at Brookline, Massachusetts abortion clinics...alleging RICO violation based on allegation that picketing and sporadic blocking of

> doors, without any entry into clinic, constituted Hobbs Act extortion...alleging violation of RICO as a result of defendants' alleged conspiracy to steal the bodies of aborted babies from garbage disposals in the Chicago area and transport them across state lines for burial...sued by owner of building that leases space to abortion clinic alleging RICO violation based upon allegation that picketing and sporadic blocking of doors, without entry into clinic, constitutes Hobbs Act extortion [citations omitted]...those intimately involved in this litigation, at least on the defendants' side, are virtually unanimous in their expression of belief and frustration that the Federal Courts are being used to suppress anti-abortion demonstrators contrary to the First Amendment and the unequivocal teaching of *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)...the principal purpose and calculated effect of these litigation tactics are to chill the exercise of Constitutional rights in the anti-abortion movement.

(*Id.* at 976).

The unparalleled breadth of RICO has already been criticized by one former Justice who indicated that:

> The Court's interpretation of [the scope] of the civil RICO statute quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law of frauds...

(*Sedima S.T.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 501 (1985))(Marshall, J. dissenting).

Justice Marshall also wrote: "[C]ivil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat." *Id.* at 506.

When we consider that "[RICO] is precisely designed to ruin those individuals and enterprises it is aimed at" through its punitive and expansive penalty provisions (*Ralston v. Kapper*, 569 F.Supp. 1575, 1580 (E.D.Mich 1983)) we must ensure that those targets of its powerful provisions are not pro-life protestors seeking a peaceful and nonviolent end to abortions.

Sometimes, nonviolent Constitutionally protected behavior is found in a milieu with non-protected activity. It is in exactly this situation that this Court has warned that"precision of regulation"is demanded. *N.A.A.C.P. v. Claiborne Hardware*, 458 U.S. 886, 916 (1982) *citing N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963).

The Court has recognized that there is a special danger to free speech when statutes are not finely drawn, and the line between lawful and unlawful speech is unclear, *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958), or when the standards for litigation are based on"shi ing sands". *Id.*

In applying the "precision of regulation" concept to the politically-motivated boycotts in *Claiborne*, which were conducted for the purposes of securing racial equality, this Court commented, with regard to the argument that speech which in some way attempts to effect or cause an economic harm should not be entitled to First Amendment protection, that"'[F]ree trade in ideas' means free trade in the opportunity to persuade to action not merely to describe facts."*Id.* at 910.

A high standard of precision is required in cases which involve a large number of citizens engaged in a wide variety of behavior so as to avoid the dangerous risk of chilling First Amendment rights. Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U.L. Rev. 685 (1978).

Precision in interpreting the provisions of RICO is necessary also to preserve freedoms of association under the First

Amendment, in as much as vicarious liability among activists would violate First Amendment rights if imposed in the context of group political action. The problem with "applying the standard rules of vicarious liability to organizations formed to achieve political goals...can be found in the Court's observation that citizens will be deterred from joining political organizations if they can be easily held jointly and severally liable for the unlawful acts of overexuberant comrades." Note, *Supreme Court, 1981 Term*, 96 Harv. L. Rev. 62 (1982).

Given the economic realities of almost all social and political action aimed at perceived social or moral evils (including abortion) almost all protest organizations have some economic component or cause some economic impact through their activities. Plaintiffs' expansive interpretation of RICO, if it prevails, will have a devastating and chilling effect on the future of robust and vigorous debate, political association, and peaceful protest activity regarding abortion. This Court must prevent a scenario, which would be played out under Petitioners' theory of law, whereby the Federal Judiciary will become a weapon of political advantage used by disgruntled pro-abortion interest groups against pro-life protestors of conscience.

II. THE SHERMAN ANTITRUST ACT DOES NOT APPLY TO THE ACTIONS OF THE RESPONDENTS

A. THE SEVENTH CIRCUIT DID NOT EXEMPT THE RESPONDENTS FROM THE SHERMAN ACT BECAUSE OF "GOOD MOTIVES," BUT RATHER BECAUSE OF NON-ECONOMIC MOTIVES.

Petitioners argue that the Seventh Circuit has erected a subjective test for exemption from the Sherman Act based on "what is socially desirable". Petition for Writ of Certiorari, page 13. However, Petitioners misstate the fundamental holding in the Seventh Circuit Decision in this matter.

The Seventh Circuit did not exempt the Respondents because of their "good motives" (one need only remember the closing remarks of the Seventh Circuit opinion in which they denominate the actions of the Respondents as "reprehensible") but rather, found that the Respondents' activities did not fit within the Sherman scheme because the intrinsic nature of the actions themselves were non-economically related ("...but the Respondents' acts are far beyond those that Congress intended to reach with the Sherman Act."). Petition for Writ of Certiorari, App. A-17.

The Sherman Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress..." *Northern Pacific Railroad v. United States*, 356 U.S. 1, 4-5 (1958).

Petitioners have wrenched the Sherman Act from its market and commercial underpinnings in an attempt to wield it as an all -purpose Damocles sword against pro-life protesters of conscience solely on the basis that their actions have economic consequences.

The Respondents in this case do not seek, for their own financial benefit or economic advantage, to preempt or usurp any portion of the health care industry and certainly not the abortion industry.

Far from basing its decision on the social utility of the Respondents' "good motives," in actuality, the Seventh Circuit decision rested its reasoning squarely on *Apex Hosiery Company v. Leader*, 310 U.S. 469 (1939). Despite the "reprehensible" conduct of the Respondents in the *Apex Hosiery* where union members forcibly took over a factory, remaining in possession for more than a month and changed locks, damaged equipment and other property, this Court concluded that there was no violation of the Sherman Act.

The Seventh Circuit Decision relied on the reasoning of *Apex Hosiery* that the Sherman Act was not designed "...to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect of any form of market control of a commodity, such as to monopolize the supply, control, its price, or discriminate between its would-be buyers." 310 U.S. at 511.

Petitioners, however, conveniently omit any reference to the *Apex Hosiery* case in their Petition for Certiorari.

Further, Petitioners reference to Professor Bork's antitrust theories in *The Antitrust Paradox* (1978) is curious (Petition for Writ of Certiorari, p. 16). Petitioners contend that Professor Bork's position that "our free market economy is based on the premise that consumers will define their own welfare" supports their interpretation of the Sherman Act. Quite the contrary, Professor Bork himself cites his work *The Antitrust Paradox* (1978) as authority for the proposition that, under the leadership of Chief Justice Warren,"antitrust law was made into an intellectual shambles as the court ruled against almost every business defendant, no matter what the precedent, the economic reality, or the lower court's finding of fact."Bork, *The Tempting of America: The Political Seduction of the Law*, p. 73 (1990).

Professor Bork's work is a strange citation of authority for Plaintiffs' even stranger interpretation of the Sherman Act in this case, particularly because he has studiously criticized the politicalization of the legal system and the use of law as a political weapon. *Id.* at 349.

Petitioners rely extensively on *Counsel of Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920). However, Petitioners' reliance is fatally flawed.

While it is true that the Seventh Circuit Decision characterized *Counsel of Defense* as "no longer good law" (Petition for

Writ of Certiorari, App. A-19), nevertheless, *Counsel of Defense*, on closer scrutiny, can be easily distinguished from the case before the Court.

As the Eighth Circuit itself indicated in *Missouri v. National Organization of Women*, 620 F.2d 1301, 1304 n.4 (8th Cir.), cert. denied, 449 U.S. 842 (1980):

> The economic coercion of the boycott [in the N.O.W. case] was designed to procure affirmative action by the Missouri Legislature. In *Counsel of Defense* there was economic punishment for past actions; in the instant case there is economic injury to achieve immediate or future action.

Similar to the facts in *Missouri v. National Organization of Women*, and unlike the *Counsel of Defense* case, the Respondents in this action created "economic injury to achieve immediate or future action."

This Court reasoned in *FTC v. Superior Court Trial Lawyers' Association*, 493 U.S. 411, 426 (1990) that the fact that boycotters or other protestors "sought no special advantage for themselves" (referring to the boycott in *N.A.A.C.P. v. Claiborne Hardware*, 458 U.S. 886 (1982) is a distinction in a "decisive respect," distancing such boycotters and other demonstrators from decisions where the conduct in question comes within the purview of the Sherman Act.

In summary, the Plaintiffs have alleged "activity distinct from the sphere of commerce" and have failed to allege, let alone prove, that the Respondents have any form of "market control," within the context of the Sherman Act. As Justice Louis Powell stated:

> Competitive economies have social and political as well as economic advantages...but an antitrust policy divorced from market considerations would lack any objective bench mark.

(*Continental T.V.. Inc. v. GTE Sylvania. Inc.*, 433 U.S. 36 (1977)).

Petitioners' theory of the Sherman Act would create a body of antitrust law that would be used indiscriminately against social and moral protesters of all stripes and persuasions, but which would lack any objective bench mark of interpretation, resulting in legal absurdities bounded only by the imagination of plaintiff litigants.

B. THE SEVENTH CIRCUIT DECISION PROTECTS FIRST AMENDMENT RIGHTS.

The likely result of the Petitioners' legal theory, if allowed to succeed, would be to "grossly over-deter" borderline free speech activity. PoKempner, *The Scope of Noerr Immunity for Direct Action Protesters: Antitrust Beats the Anti-Abortionists*, 89 Colum. L.Rev. 662, 696 (1989).

The jurisprudential walls that protect First Amendment rights must necessarily be high and relatively impenetrable if we are to give freedoms of expression the "breathing space that they need to survive." *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964).

Overly-broad interpretations of the Sherman Act will likely chill the participation of activist sympathizers who fear that their mere association with activist organizations may result in substantial liability for antitrust damages.

This Court has previously stated, relative to the Sherman Act, that:

> No violation of the Act can be predicated upon mere attempts to influence the passage or *enforcement* of laws.

(*Eastern Railroad Presidents' Conference v. Noerr Motor Freight Company. Inc.*, 365 U.S. 127, 135 (1961)(emphasis added).

While the Seventh Circuit criticized the *alleged* actions of the Respondents in this case, even placing the alleged activities of the Respondents in the light most favorable to the Petitioner, the acts of trespassing and disorderly conduct at abortion clinics can be accurately characterized as a "mere attempt to influence the...*enforcement* of laws" relating to the right of women to have abortions.

We believe there are striking similarities between the alleged activities of the Respondents in this case and the sometimes violent boycotts in *N.A.A.C.P. v. Claiborne Hardware* (Supra). Where a particular political or social campaign is "not intended to destroy legitimate competition," the Sherman Act has no application. *Claiborne Hardware*, 458 U.S. at 914.

As was the case in *Claiborne Hardware*, we must avoid a construction of the Sherman Act which would result in a "complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." *Claiborne Hardware Co.*, 458 U.S. at 914.

Because statutes that touch on First Amendment activities must be narrowly interpreted and narrowly drawn to address only the specific evil at hand (*Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973), and because Petitioners' interpretation of the Sherman Act goes far beyond addressing the specific evils for which the Sherman Act was designed and places an unconscionable and unconstitutional strangle hold on the free speech and free association rights of present and future pro-life activists, it must be unilaterally rejected and this Petition should be denied.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals should be denied.

Respectfully submitted,

Alexis I. Crow
Counsel of Record
John W. Whitehead
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, VA 22901
(804) 978-3888

Craig L. Parshall
THE RUTHERFORD INSTITUTE of WISCONSIN
N96 W18221 County Line Road
Suite 206
Menomonee Falls, WI 53051
(414) 251-9440

(7)

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No. 92-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

v.

JOSEPH SCHEIDLER, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

Of Counsel:

LOWELL E. SACHNOFF, ESQ.
JACK L. BLOCK, ESQ.
JUDI A. LAMBLE, ESQ.
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000

ALAN M. POLLACK, ESQ.
POLLACK & GREENE
488 Madison Avenue
New York, New York 10022
(212) 688-5888

FAY CLAYTON, ESQ.
Counsel of Record
SUSAN VALENTINE, ESQ.
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

Counsel for the Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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No. 92-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

v.

JOSEPH SCHEIDLER, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

In opposing certiorari, defendants' five briefs raise a host of arguments and ask this Court to ignore facts in the record. While a 10-page reply cannot possibly deal with all the arguments, we will address the main ones; a few subsidiary issues are discussed in the margin.[1]

I.

THE COMPLAINT AND RICO STATEMENT MUST BE TAKEN AS TRUE

Defendants' distortions of the record require a short discussion of the governing procedural law. This case comes under Rule 12(b)(6), Fed.R.Civ.P. Since *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), this Court has held that plaintiffs' allegations must be accepted as true and reasonable inferences drawn in plaintiffs' favor. *Hishon v. King Spaulding*, 467 U.S. 69, 73 (1984), reaffirmed that, "the court may dismiss a complaint only if it is clear that no

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[1] Ryan suggests (without authority) that, despite more than 300 arrests for anti-clinic lawlessness, he cannot be sued as a conspirator in this class action if he did not personally set foot on the class representatives' property. This is not the law. *E.g., Blumenthal v. United States*, 332 U.S. 539 (1947). As to the class issue, we repeatedly moved for certification beginning in 1987, but, at defendants' insistence, the court deferred decision again and again.

Vital-Med Laboratories ("Vital-Med") recasts the case as a unilateral refusal to deal, ignoring the fact that it joined the conspiracy, participated in the unlawful removal of the fetuses, and terminated its services to the clinics *at its co-conspirators' insistence*. In *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1163 (1987), *cert. denied*, 486 U.S. 1005 (1988), Judge Posner explained, "a conspiracy is not less sinister because some of its members are intimidated, rather than bribed, into joining it." Vital-Med also focuses on the wrong market: it is not just pathology services that are being restrained (although that market is highly concentrated). Vital-Med conspired to restrain competition for *pregnancy-related services*, the market defined below.

Terry's discussion of discovery issues only demonstrates how broad and unfocused his discovery requests were.

relief could be granted under any set of facts that could be proved consistent with the allegations." In other cases, the Seventh Circuit has followed this edict. *Hrubec v. National Railroad Passenger Corp.*, 1992 WL 365712 (Dec. 14, 1992), stated:

> A complaint [may] not be dismissed unless no relief may be granted "under any set of facts that could be proved *consistent* with the allegations". . . . A plaintiff need not put all the essential facts in the complaint. He may add them by affidavit or brief—even a brief on appeal. (Emphasis in original).

"The plaintiff is free in defending against a motion to dismiss, to allege without evidentiary support any facts he pleases that are consistent with the complaint, in order to show that there is a state of facts within the scope of the complaint that if proved (a matter for trial), would entitle him to judgment." *Early v. Bankers Life and Casualty Company*, 959 F.2d 75, 79 (7th Cir. 1992). Despite the generous pleading rules, the complaint gave far more detail than the bare notice required.[2] Further, at defendants' request, the court required a RICO Statement; we filed a 107-page document detailing hundreds of predicate acts. R.469. In response to further motions, we provided evidence of Scheidler's personal ties to clinic arson. *See* App. A-3 n.5.[3] Although it was *defendants* who insisted on the RICO Statement, they ask the Court to disregard it. They cite no authority suggesting that it should be ignored and all the caselaw indicates it is a pleading, like an addendum to a complaint. *E.g., Parker & Parsley Petroleum v. Dresser Industries*, 972 F.2d 580, 584 (5th Cir.

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[2] *E.g.*, ¶¶2, 38-78 detail lawless acts, formation of the conspiracy, the names of the perpetrators and its organizational structure; ¶98(a)-(1) details some of the acts of extortion.

[3] Operation Rescue stoops to name-calling ("paranoid," "surreal," "outlandish delusions") to mask both the destructiveness of its conduct and its financial dimension.

1992); *Marriott Bros. v. Gage*, 911 F.2d 1105, 1107 (5th Cir. 1990). This result is in keeping with *Hishon*, *Conley*, *Early*, and *Hrubec*, because a RICO Statement describes a set of facts that could be proven consistent with the complaint. (Thus, it applies to the antitrust defendants, too.) Defendants' argument that the RICO Statement should be ignored is mistaken.

II.

THE FIRST AMENDMENT IS NOT IMPLICATED HERE

Several defendants argue infringement of First Amendment rights since, in addition to crimes, some of them engage in lawful speech. Migliorino characterizes her entry by night and removal of fetuses and chaining herself to surgical equipment as "borderline free speech activity." Scheidler advocates riots, forgetting that our nation is based on laws not terrorism.

The complaint focuses on activities *unprotected* by the First Amendment. *See* App. B-3. Defendants' conduct was neither peaceful nor aimed to influence the government. *See* App. D-2, D-3. The First Amendment has never immunized speech that is an integral part of criminal conduct, *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949). *Wilk v. American Medical Association*, 719 F.2d 207, 215 n.6 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984), explained, "that *some* activities of a particular organization are protected by the First Amendment does not shield *all* its activities under *Noerr-Pennington*." Defendants here are in a particularly poor position to invoke the First Amendment because they have disavowed lawful speech and lobbying and have acted directly against their competitors. Such conduct has never been protected.

Scheidler argues that the complaint must be pled with extra specificity but his authorities do not support him. *Franchise Realty Interstate Corp. v. S. F. Loc. Joint*

Exec. Bd., 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977), held that when a complaint alleged only that defendant's lobbying violated the antitrust laws, it had pled the *Noerr-Pennington* exception, which is not actionable. The complaint here does not allege lobbying. Scheidler's reference to *Herzbrun v. Milwaukee County*, 504 F.2d 1189, 1197 (7th Cir. 1974) (Stevens, J., concurring), is also surprising. Justice Stevens said:

> but our interest in freedom of speech does not justify incurring the cost of committing harmful conduct to go unpunished if that conduct is not even arguably communicative, and is plainly unprotected by the Constitution.

Id. at 1197-98. *Herzbrun* held defendant's conduct unprotected even though she called it communicative; *Herzbrun* supports petitioners. As the lower court noted, "the complaint does not allege that defendants have attempted to influence any government actor." App. A-6. Defendants' "avowed purpose" is to shut down clinics, not influence government. App. A-8 n.6.

Scheidler's citation to *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), does not help him either. He claims that *Claiborne* requires that the complaint "allege with precision" the exact conduct that has no First Amendment protection. Brief at 28. But *Claiborne* discusses court judgments, not pleading rules. Even if "precision" were required, the complaint and RICO Statement provide it: they describe vicious criminal and tortious conduct, not speech. Cplt. ¶¶ 2, 38-78, 98(a)-(l); R.469. As *Claiborne* made clear, " 'the use of weapons, gun powder, and gasoline may not constitutionally masquerade under the guise of advocacy.' " 458 U.S. at 916. There are no extra pleading requirements here.

The defendants invoke the name of Dr. Martin Luther King, Jr., but they more closely resemble Orville Faubus, blocking children at the schoolhouse door as they tried to

exercise rights of which Faubus did not approve. The acts sued on here are *not* political and they are *not* speech. Defendants' invocation of the First Amendment only demonstrates their "audacity." App. A-15.

III.

THE SEVENTH CIRCUIT'S ECONOMIC MOTIVE REQUIREMENT FOR RICO IS INCONSISTENT WITH THE SECOND AND EIGHTH CIRCUITS' AND SQUARELY CONFLICTS WITH THE THIRD'S

Migliorino argues that the Seventh Circuit, like the Second and Eighth, has required that defendants' RICO acts be "*primarily* directed toward an economic goal." Brief at 4. This *is* what the Seventh Circuit—in error—required; but the Second and Eighth require far less. Indeed, the other defendants acknowledge that the Second and Eighth Circuits require only "some" financial element. That the Seventh Circuit required more is established by the fact that economic benefits and goals are pled.[4]

Some defendants argue that in *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983), the Second Circuit required a *primary* economic motive. They ignore *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983), which rejected the reading they offer and held that only "an objective appraisal that some economic purpose was to be accomplished" is needed. *See also United*

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[4] [I]n 1986, PLAL had income over $118,000, and in the same year Scheidler was paid a salary of over $45,000 from PLAL. . . . [T]he former bookkeeper of Operation Rescue testified . . . that in 1989, the organization received income of at least $777,000. . . . Contributions are sent to the RICO Defendants and others for the purpose of supporting these illegal acts. It is well-known that the more outrageous and highly-publicized the activities are, the more likely the RICO Defendants and the enterprises are to receive large donations.

R.469 at 17 n.5, 18, 22.

States v. Ferguson, 758 F.2d 843, 853 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985) (*no significant economic purpose* is required). The complaint satisfies the Second Circuit's "some" economic purpose standard.

The result under Eighth Circuit law is the same. Although some defendants rely on *United States v. Flynn*, 852 F.2d 1045 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988), *Flynn* never required motive at all; it merely cited *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981), and found an economic goal was present. *See* 852 F.2d at 1052. *Anderson* mentioned *in dicta* that the enterprise must be directed "toward an economic goal." But *United States v. Clark*, 646 F.2d 1259, 1265 n.11 (8th Cir. 1981), made clear that *Anderson* does *not* limit RICO enterprises to those that exist for "maintaining operations directed toward an economic goal."

Scheidler is disingenuous in saying that *United States v. Ellison*, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986), did not discuss economic issues. *Ellison* held that predicate acts need not *benefit* the enterprise but only *affect* it, as by bolstering its members' morale. *Id.* at 950. Here, the predicate acts provide income needed by the enterprises and, as in *Ellison*, bolster morale.

If it had followed the Second or Eighth Circuits, the Seventh Circuit would have sustained the complaint because "some" financial element is "consistent with" the complaint. *See Hishon*, 467 U.S. at 73. But the Seventh Circuit required more; it required, as Migliorino argues, that the defendants' *primary* motive be economic. This conflicts with the Second and Eighth Circuits.

There is no serious question that the Seventh Circuit's opinion squarely conflicts with *Northeast Women's Center v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493

U.S. 901 (1989).[5] Even the Seventh Circuit noted that *McMonagle* and the Second and Eighth Circuit cases conflict. App. A-26. Insofar as the Seventh Circuit claims to be following the Second and Eighth, it inevitably conflicts with the Third. Insofar as it imposes requirements that go beyond the Second and Eighth, it is inconsistent with those Circuits and conflicts even further with the Third.

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[5] Defendants misstate *McMonagle* in claiming it did not discuss whether an economic motive is needed. As Justice White pointed out, dissenting from the denial of a writ of certiorari, the issue was "whether liability under RICO may be imposed where neither the 'enterprise' nor the 'pattern of racketeering activities' had any profit-making element." 493 U.S. 901 (1989). *See also McMonagle*, 868 F.2d at 1349 n.7 ("the defendants claim their activities were completely devoid of economic purpose").

Defendants' many arguments about the Hobbs Act were rejected below, *see* App. A-32 n.17, and deserve only brief mention. Intangible rights are property under the Hobbs Act. *E.g., United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987). Defendants extorted clinics' rights to conduct lawful business, and women's to use their services; these are property rights entitled to protection from fear and threats. *Northeast Women's Center, Inc. v. McMonagle*, 689 F.Supp. 465, 474 (E.D. Pa. 1988), *aff'd.*, 868 F.2d 1342, *cert. denied*, 493 U.S. 901 (1989). Defendants need not receive any benefit from the extortion. *United States v. Green*, 350 U.S. 415, 418-20 (1955). Causing others to give up something of value is sufficient. *See Lewis*, 797 F.2d at 364 n.3. Defendants threaten to commit crimes if clinic personnel and patients do not give up their rights to provide or seek these services. Their acts instill fear in their victims; their announcement that "no clinic will be spared" makes every clinic and patient fear that they may be the next target if they exercise their rights. This is extortion. *See United States v. Duhon*, 565 F.2d 345 (5th Cir.), *cert. denied*, 435 U.S. 952 (1978).

IV.

THE CONSPIRACY CAUSED ANTITRUST INJURY, RESTRAINED COMPETITION AND INJURED CONSUMERS

In direct conflict with *Council of Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920),[6] the Seventh Circuit held the Sherman Act inapplicable even though the conspiracy aimed to (and did) raise costs and consumer prices, Cplt. ¶ 87, restrained competition and injured consumers. *E.g.*, Cplt. ¶¶ 23-27, 44-45. Defendants vowed to take away business of all pro-choice clinics, which are vitally involved in interstate commerce. Cplt. ¶¶ 23-27. Defendants are their "competitors in commerce"; defendants own and operate businesses that compete for pregnancy-related services, such as pregnancy testing and counseling. Cplt. ¶¶ 2, 11, 13.

Scheidler tries to distinguish *Council*, saying "commercial relationships and activities were directly at issue"; so are they here. Defendants employ "commercial means": they interfere with leases and other contracts and make false appointments and tie up phone lines. Market power (the ability to restrict output or raise prices) is well pled. Cplt. ¶¶ 86, 87. *See United States v. DuPont*, 351 U.S. 377, 391 (1956).

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[6] *Missouri v. NOW*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980), did not limit *Council* as Scheidler claims. *Missouri* reaffirmed *Council* and explained that the fundamental distinction was that *Missouri* involved petitioning and *Council* did not. Ryan's lengthy discussion of antitrust cases overlooks the same distinction: most of his cases involved petitioning or speech, *e.g.*, *Proctor v. General Conference*, 651 F.Supp. 1505 (N.D. Ill. 1986); *Barr v. National Right to Life Committee*, 1981-2 Trade Cos. (CCH) ¶ 64,315 (M.D. Fla. 1981). Others did not involve commerce, *e.g.*, *Swan v. First Church of Christ*, 225 F.2d 745 (9th Cir. 1955). Ryan also misstates *Parker v. Brown*, 317 U.S. 341, 351 (1943), which never suggested that "voluntary associations" are exempt. *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), proves they are not.

Defendants largely abandon the lower courts' analyses and argue that a "non-commercial conspiracy" (whatever that means) is outside the Sherman Act. But they fail to explain 100 years of this Court's teaching that the Act covers "every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which they are clothed." *United States v. American Tobacco Co.*, 221 U.S. 106, 181 (1911). "Unique" claims are not rejected but analyzed to weigh pro-competitive effects against anti-competitive ones. *E.g., NCAA v. Board of Regents*, 468 U.S. 85, 100 n.21 (1984); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975) (Sherman Act is extremely broad, carrying a heavy presumption against exemptions). Even if a conspiracy has "non-commercial" purposes and "non-commercial" members,[7] the Sherman Act applies if it restrains competition. This conspiracy does.

Defendants rely heavily on *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940). *Apex* supports petitioners. Noting that in the Sherman Act, "Congress exercised all the power it possessed," and reached every restraint that "involved or affected interstate commerce," *id.* at 495, *Apex* taught that the key to Sherman Act liability is whether the conspiracy is intended to or capable of *affecting competition* as opposed to just one competitor. *Id.* at 511-12. In *Apex*, only a single supplier was affected; this had no impact on competition since other suppliers were not targeted. Here, the conspirators have targeted *all* pro-choice clinics, beginning in the most concentrated geographic markets. Cplt. ¶¶ 6, 26. They threaten not just one supplier, as in *Apex*, but supply itself, as in *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925). Contrary to defendants' suggestion, *Apex* gives no hint that

[7] Non-profit organizations (which most defendants are *not*) are subject to the Act. *Board of Regents*, 468 U.S. at 100 n.22.

a "non-commercial" conspiracy is exempt (*Apex* discussed at length how unions are not exempt, 310 U.S. at 487-88). Both the intent and inevitable effect of defendants' acts are to raise prices to consumers of pregnancy-related services (they have already done so, Cplt. ¶ 87) and eliminate competition. Defendants want only *their* brand of pregnancy-related services to be available. Suppression of competition, monopoly of supply and control of price are precisely their goals. If they succeed, only hospital abortions (at two to five times the price, Cplt. ¶ 8) and clinics like Terry's and Wojnar's will be left.

Defendants argue that the illegality of their acts under state law somehow protects them. They are wrong; illegality is irrelevant (except to establish that the Constitution does not shield them). *Apex*, 310 U.S. at 513. *See also Coronado Coal*, 268 U.S. 295 (1925) (finding liability when union, *inter alia*, vandalized property in effort to restrict supply).

Defendants have targeted competition, not just one or two competitors. They have chosen methods that injure consumers—methods that find no protection in the Constitution. If this Court means what it has said about the scope of the Sherman Act for 100 years, it should grant certiorari and reverse the opinion of the Seventh Circuit.

Respectfully submitted,

Of Counsel:

LOWELL E. SACHNOFF, ESQ.
JACK L. BLOCK, ESQ.
JUDI A. LAMBLE, ESQ.
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606

ALAN M. POLLACK, ESQ.
POLLACK & GREENE
488 Madison Avenue
New York, New York 10022

FAY CLAYTON, ESQ.
Counsel of Record
SUSAN VALENTINE, ESQ.
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606

Counsel for the Petitioners

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No. 92-780

In the Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., ETC., ET AL., PETITIONERS

v.

JOSEPH SCHEIDLER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MIGUEL A. ESTRADA
Assistant to the Solicitor General

CYNTHIA A. YOUNG
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether 18 U.S.C. 1962(c) and (d) require proof of economic motivation either in the racketeering enterprise or in the racketeering acts.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-780

NATIONAL ORGANIZATION FOR WOMEN, INC., ETC., ET AL., PETITIONERS

v.

JOSEPH SCHEIDLER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners are a national non-profit organization that supports the legal availability of abortion, and two health centers that perform abortions. Respondents are several individuals and organizations that oppose abortion, and a medical laboratory that formerly provided services to the two petitioner health centers. Pet. App. A2-A5, B2-B3.

In October 1986, petitioners sued respondents in the United States District Court for the Northern District of Illinois, alleging violations of the Sherman Act, 15 U.S.C. 1 *et seq.*, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(a), (c), and (d), as well as several pendent state-law claims. Petitioners sought injunctive relief, as well as treble damages, costs, and attorneys' fees. Following discovery, the complaint was amended twice in 1989. In March 1991, petitioners filed a "RICO Case Statement" that further detailed their allegations.[1]

As amended, the complaint alleged that respondents were members of a nationwide conspiracy to shut down abortion clinics through a pattern of extortion. Petitioners alleged that respondents (other than respondent Vital-Med Laboratories, Inc.)[2] and their co-conspirators used force and threatened the use of force to induce doctors and clinic employees to give

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[1] Pursuant to local rules, some district courts require RICO plaintiffs to submit a "RICO Case Statement" detailing, among other things, the enterprise, the pattern, the victims, and the participants involved. Contrary to respondents' claim, see Terry Br. in Opp. 2-3 & n.3, RICO Case Statements are merely extensions of the pleadings and thus may properly be (and routinely are) considered by courts in deciding motions under Fed. R. Civ. P. 12(b)(6). See *McLaughlin* v. *Anderson*, 962 F.2d 187, 189 (2d Cir. 1992); *Guidry* v. *Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992); *Glessner* v. *Kenny*, 952 F.2d 702, 712 n.9 (3d Cir. 1991); *Miranda* v. *Ponce Federal Bank*, 948 F.2d 41, 44 n.3 (1st Cir. 1991).

[2] As to respondent Vital-Med, petitioners alleged that it participated in the conspiracy by aiding numerous thefts of fetal remains from one of Vital-Med's laboratories during 1988. See Pet. App. A4-A5.

up their economic rights to employment, and to induce patients to give up their rights to medical services. Specifically, the complaint charged that respondents physically and verbally intimidated clinic personnel and patients; invaded clinics and damaged their equipment; blocked clinic entrances and exits; coordinated telephone campaigns to tie up clinic telephones; set up appointments under false pretenses to prevent legitimate patients from making appointments; established competing pregnancy testing and counseling facilities near the clinics; and interfered with the clinics' business relationships with landlords, patients, personnel, and medical laboratories. The RICO Case Statement further alleged that respondents and their co-conspirators engaged in bombings and numerous acts of arson and attempted arson to carry out the extortion scheme. With respect to their substantive and conspiracy claims based on 18 U.S.C. 1962(c), petitioners alleged that the racketeering "enterprise" was respondent Pro-Life Action Network (PLAN), a coalition of anti-abortion groups. Pet. App. A2-A3 & n.5.

2. The district court dismissed the case pursuant to Rule 12(b)(6), Fed. R. Civ. P. The court first concluded that the Sherman Act does not apply when the activities complained of are essentially "political," and the parties are not "commercial competitors." Pet. App. B3-B8. The court next rejected petitioners' claim under 18 U.S.C. 1962(a), which generally proscribes investing racketeering income to acquire or maintain an interest in an enterprise, because the "income" alleged by petitioners consisted of voluntary donations from persons opposed to abortion, which "in no way were derived from the pattern of racketeering alleged in the complaint." Pet. App. B9.

The court then concluded that petitioners failed to state a claim under 18 U.S.C. 1962(c), which makes it unlawful to conduct the affairs of an enterprise through a pattern of racketeering activity. Relying on the Second Circuit's opinion in *United States* v. *Ivic*, 700 F.2d 51 (2d Cir. 1983), and its progeny, the court held that RICO embodies "an economic motive requirement * * * to the extent that some profit-generating purpose must be alleged in order to state a RICO claim [under Section 1962(c)]." Pet. App. B13. Because "the primary objective of the alleged enterprise and its pattern of predicate acts was to drive clinics that perform abortions out of business," and the predicate acts were not "crimes in which the necessary goal was to obtain money," *id.* at B15, the court concluded that petitioners failed "to allege the economic motivation requirement of RICO." *Id.* at B16. In light of its dismissal of petitioners' claims under 18 U.S.C. 1962(a) and (c), the court also dismissed the claim that respondents conspired to violate those sections, in violation of 18 U.S.C. 1962(d). Pet. App. B16. Finally, the court declined jurisdiction over the pendent state-law claims because of its dismissal of all the federal claims. Pet. App. B16-B17.

2. The court of appeals affirmed. Pet. App. A1-A35. The court first held that the antitrust claim was properly dismissed, noting that respondents are not involved in business and have no ability to concentrate economic power. *Id.* at A15-A16. The court also agreed with the district court's conclusion that the voluntary contributions received by respondents from their supporters are not income "derived, directly or indirectly, from a pattern of racketeering activity," and accordingly that those contributions

cannot support petitioners' claim under 18 U.S.C. 1962(a). Pet. App. A20-A24.

The court of appeals next turned to petitioners' claim that respondents conducted the affairs of PLAN through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c). Pet. App. A24-A34. The court agreed (Pet. App. A32-A33) with the Third Circuit's conclusion in *Northeast Women's Center, Inc.* v. *McMonagle*, 868 F.2d 1342 (3d Cir.), cert. denied, 493 U.S. 901 (1989), that conduct of the type alleged by petitioners constitutes extortion under the Hobbs Act, 18 U.S.C. 1951—a predicate crime under RICO. The court disagreed, however, with *McMonagle*'s conclusion that a pattern of such conduct is actionable under RICO. Pet. App. A32-A33. Like the district court, the court of appeals elected to follow instead the Second Circuit's decision in *Ivic*, which held that an "economic motive" requirement is implicit in the "enterprise" element of the offense. The court therefore concluded that "non-economic crimes committed in furtherance of non-economic motives are not within the ambit of RICO." *Id.* at A32. Because it was "clear that the aim of the extortion[s] [was] to close women's health centers" rather than to raise funds, and because the economic effect of respondent's conduct did not establish the "economic motive required by *Ivic* and its progeny," the court concluded that petitioners failed to state a claim under 18 U.S.C. 1962(c). Pet. App. A33-A34. In light of its conclusions concerning petitioners' substantive RICO claims, the court also affirmed the dismissal of the conspiracy claim under 18 U.S.C. 1962(d). Pet. App. A34.

DISCUSSION

Petitioners challenge the court of appeals' conclusion that they failed to state a claim under Sections 1962(c) and (d).[3] In our view, the court of appeals erred in concluding that RICO requires proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose. Because the courts of appeals have disagreed on whether RICO imposes such a requirement, the Court should grant certiorari to resolve the conflict.

1. a. In construing RICO, this Court has consistently emphasized that the statutory language "must ordinarily be regarded as conclusive." *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). See also *Reves* v. *Ernst & Young*, 113 S. Ct. 1163, 1169 (1993). That principle governs this case. Section 1962(c) makes it unlawful "for any person employed by or associated with any enterprise * * * to conduct or participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity." Nothing in that broad proscription suggests a congressional design to reach only conduct involving economic motivations, goals, or purposes.

Thus, the phrase "racketeering activity" means conduct that is "chargeable" or "indictable" under a wide range of state and federal laws, including non-economic crimes such as murder, arson, and obstruction of justice, 18 U.S.C. 1961(1). The "enterprise"

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[3] Petitioners do not appear to challenge in this Court the dismissal of their claim under Section 1962(a) or the dismissal of their Section 1962(d) claim to the extent the latter claim alleged a conspiracy to violate Section 1962(a).

element, in which the court of appeals purported to find an "economic motive" limitation, is no less broad. Section 1961(4) provides that " 'enterprise' includes *any* individual, partnership, corporation, association, or other legal entity, and *any* union or *group of individuals associated in fact* although not a legal entity" (emphasis added). By using the inclusive word "any," the statute clearly manifests an intent to embrace the totality of "individual[s]" and "group[s] of individuals associated in fact." That intent is confirmed by the use of the word "includes"—as distinct from the word "means" used in other RICO definitions, see, *e.g.*, 18 U.S.C. 1961(6)—which denotes a broad illustrative list, not an exhaustive one. Cf. *Helvering* v. *Morgan's Inc.*, 293 U.S. 121, 125 & n.1 (1934). Because it is difficult to imagine a statutory definition less susceptible to a narrow and grudging interpretation, this Court in *United States* v. *Turkette*, *supra*, rejected the claim that it should be confined to "legitimate" organizations, noting that "[t]here is no restriction upon the associations embraced by the definition." 452 U.S. at 480.[4]

b. In narrowing the scope of the statutory language, the court of appeals relied principally on the reasoning of *Ivic*. In that case, the Second Circuit

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[4] This is not to suggest that economic factors are utterly irrelevant to RICO. All of the RICO prohibitions require that the enterprise be engaged in or that its activities affect interstate or foreign commerce. See 18 U.S.C. 1962(a), (b), and (c). In addition, RICO requires that a civil plaintiff show that he has been "injured in his business or property" by the conduct constituting the RICO violation. 18 U.S.C. 1964(c). Respondents do not suggest that petitioners cannot meet those modest requirements.

reversed the Section 1962(c) convictions of Croatian nationalists who had plotted to "use terror, assassination, bombings, and violence," *United States* v. *Ivic*, 700 F.2d at 58, to further the political cause of Croatian independence. The Second Circuit noted that the term "enterprise" is used in Sections 1962(a) and (b), which prohibit (1) using racketeering income to acquire an interest in an enterprise, or to establish or operate an enterprise, and (2) maintaining an interest in or control of an enterprise. As used in those sections, the Second Circuit explained, the term "quite clearly refers to the sort of entity in which funds can be invested and a property interest of some sort acquired, and hence the sort of entity which one joins to make money." *United States* v. *Ivic*, 700 F.2d at 60-61. The *Ivic* court therefore concluded that a parallel limitation must be read into Section 1962(c). See also *United States* v. *Flynn*, 852 F.2d 1045, 1052 (8th Cir.) (following *Ivic*), cert. denied, 488 U.S. 974 (1988).

We believe the Second Circuit's statutory analysis misses the mark for several reasons. First, because the term "enterprise" is defined by RICO, the *Ivic* court erred in seeking its meaning from the various contexts in which the term is used in the statute, rather than simply applying the broad definition enacted by Congress.

Second, the Second Circuit erred in concluding that, as used in Sections 1962(a) and (b), "enterprise" refers solely to an entity in which funds can be invested or a property "interest" of some sort can be acquired. That conclusion ignores the fact that those sections also outlaw "us[ing]" racketeering funds in the "operation" of any enterprise, 18 U.S.C. 1962(a), as well as "maintain[ing]" an interest in "or control"

of an enterprise through racketeering, 18 U.S.C. 1962(b). An enterprise can be "operat[ed]" or "control[led]" within the meaning of Sections 1962(a) and (b) even if it is not an entity in which funds can be invested or a property interest acquired. The Second Circuit's construction of the term "enterprise" also ignores the holding of *Turkette*, since the illegitimate associations *Turkette* found to be statutory "enterprises" will rarely if ever be the type of entities in which formal investments can be made, or in which traditional property interests can be acquired. See *Russello* v. *United States*, 464 U.S. 16, 24 (1983). And it is inconsistent with the analysis in *Russello* v. *United States*, *supra*, which recognized that Congress used the broad term "interest," rather than a more restrictive term, "because [it] did not wish * * * to be limited by rigid and technical definitions drawn from other areas of the law." *Id.* at 21.

Third, even if the *Ivic* court were correct in concluding that Sections 1962(a) and (b) contemplate only enterprises in which funds can be invested or in which formal property interests can be acquired, it does not follow that entities that cannot violate those two sections must be removed entirely from the reach of other sections of the statute. The inapplicability of the full range of statutory provisions to an entity does not imply that the entity can *never* be a RICO "enterprise." See *United States* v. *Turkette*, 452 U.S. at 585 ("Even if one or more of the civil remedies might be inapplicable to a particular illegitimate enterprise, this fact would not serve to limit the enterprise concept.").[5]

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[5] *Ivic*'s gloss on the "enterprise" element, if widely followed, would severely contract the scope of RICO, eliminating from its reach government agencies, courts, non-profit organi-

Nor does the analytical foundation of *Ivic* square with the court's conclusion: It does not logically follow from *Ivic*'s premise—*i.e.*, that Sections 1962(a) and (b) contemplate only entities in which funds may be invested or in which an interest may be acquired—that the entities covered by Sections 1962(a) and (b) necessarily have the making of money as their *purpose*. Not-for-profit organizations are not inherently incapable of receiving racketeering proceeds, nor are they necessarily less susceptible to any of the other abuses RICO sought to prevent.

The insubstantiality of the textual basis proffered by *Ivic* (and endorsed by the court of appeals in this case) for any "economic motive" requirement is revealed by the fact that *Ivic*, the Second Circuit's cases following *Ivic*, and the court of appeals' opinion in this case all hold that the "enterprise" need not be shown to have an economic purpose after all—as long as the predicate acts are motivated by such a purpose. See *United States* v. *Bagaric*, 706 F.2d 42, 56-57 (2d Cir.) (enterprise composed of terrorists who sought Croatian independence, and who mur-

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zations, and other non-economic entities that the lower courts have consistently held to fall within the statutory definition. See, *e.g.*, *United States* v. *Hocking*, 860 F.2d 769, 778 (7th Cir. 1988) (Illinois Department of Transportation); *United States* v. *Yonan*, 800 F.2d 164, 167-168 (7th Cir. 1986) (Cook County State's Attorney's Office), cert. denied, 479 U.S. 1055 (1987); *United States* v. *De Peri*, 778 F.2d 963, 974 (3d Cir. 1985) (Philadelphia Police Department), cert. denied, 475 U.S. 1110 (1986); *United States* v. *Ferguson*, 758 F.2d 843, 848-849 (2d Cir.) (Black Liberation Army), cert. denied, 474 U.S. 1032 (1985); *United States* v. *Qaoud*, 777 F.2d 1105, 1116 (6th Cir. 1985) (office of Michigan District Court of the 18th District), cert. denied, 475 U.S. 1098 (1986); *United States* v. *Clark*, 646 F.2d 1259, 1263 (8th Cir. 1981) (office of County Judge).

dered those who failed to comply with extortion letters designed to raise money for that cause), cert. denied, 464 U.S. 840 (1983); *United States* v. *Ivic*, 700 F.2d at 65; Pet. App. A31. That the requisite economic motive or purpose may be found in the racketeering acts, even when the enterprise is shown to have a primarily "political" purpose, belies any claim that the term "enterprise" incorporates the requirement adopted by the court of appeals.[6]

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[6] *Ivic* also relied on guidelines for RICO prosecutions issued by the Department of Justice in 1981, which the court believed were entitled to deference under administrative law principles. See 700 F.2d at 64. The guidelines on which *Ivic* relied were superseded in 1984 to provide, contrary to the court's position in *Ivic*, that an association-in-fact enterprise must be "directed toward an economic *or other identifiable goal.*" U.S. Attorneys' Manual § 9-110.360 (Mar. 9, 1984) (emphasis added). The current United States Attorneys' Manual omits even that restriction.

In our view, *Ivic* erred in relying on the Department of Justice's RICO guidelines to reach its conclusion. To begin with, it is open to question whether the Department's construction of a criminal statute is entitled to administrative deference. See *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment). In any event, when such deference is appropriate, an agency's interpretation of the law may be used only to clarify statutory ambiguities; deference does not come into play unless the statute in question is ambiguous. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 447-448 (1987). In light of the breadth of RICO's language, there can be no claim that the statute is ambiguous with respect to the issue presented here. Finally, the United States Attorneys' Manual is not intended to incorporate the Department's view of what the law is, but merely to provide internal guidance on the exercise of prosecutorial discretion. Because of that focus, the Manual expressly notes that it is "not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." U.S. At-

2. The court of appeals also relied on the legislative history of RICO, which shows that a principal concern of RICO's drafters was "the infiltration of organized crime into legitimate business." Pet. App. A28. While the court of appeals conceded that Congress's concerns extended beyond the infiltration of legitimate businesses by organized crime, it appeared to place some weight on the fact that "political terrorist organizations do not generate funds that could allow them to infiltrate legitimate business," *id.* at A28-A29, as indicating that Congress's concerns "may not have" extended to the conduct "of political terrorists." *Id.* at A29.

The short answer to that assertion is that speculation about the probable reach of concerns expressed by legislative history cannot substitute for interpretation of the language actually enacted by Congress. See *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 495-496 n.13 (1985). As this Court has repeatedly emphasized, "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988). See also *Moskal* v. *United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history."). Because the statutory language does not encompass the limitation supposed by the court of appeals, the failure of the legislative

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torneys' Manual § 1-1.100 (Oct. 1, 1988). See *United States* v. *Carson*, 969 F.2d 1480, 1495 n.8 (3d Cir. 1992); *United States* v. *Senibaldi*, 959 F.2d 1131, 1136 (1st Cir. 1992). The Department's decision, at some point in the past, not to invoke RICO in the case of non-economic enterprises thus does not suggest that the statute should be read to exclude such enterprises from its reach.

history specifically to advert to the application of RICO urged by petitioners cannot be used to create an exception not otherwise found in the statute.[7]

3. In addition to lacking a foundation in the statutory language or the legislative history, the "economic motive" requirement endorsed by the court of appeals poses serious definitional problems that bear little, if any, relation to the policies of RICO. Among those problems are the extent to which a financial purpose must be present before the court of appeals' "economic motive" requirement is satisfied, and whether the "economic motive" must have caused either the formation of the enterprise or the commission of one or more of the predicate crimes. A political organization engaging in a pattern of unlawful acts may do so principally for political reasons, but the acts may have some incidental economic benefits for the organization—such as increasing contribu-

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[7] The court of appeals' reliance on the references in the legislative history to the infiltration of organized crime into legitimate businesses recalls the argument that was raised, and rejected, in *United States* v. *Turkette, supra.* There, the Court held that RICO was not meant to be restricted to combatting the infiltration of organized crime into legitimate businesses, but was meant to reach "the activities of enterprises organized and existing for criminal purposes." 452 U.S. at 591. The legislative history of RICO thus does not suggest that the scope of RICO should be restricted in the manner suggested by the court of appeals. Indeed, to the extent the legislative history speaks to the issue at all, it undermines the conclusion reached by the court of appeals. We note, for example, that the original bill that ultimately evolved into Section 1962 referred to "business enterprise[s]," rather than "enterprises." S. 1623, 91st Cong., 1st Sess. § 2 (1969). When Congress "includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello* v. *United States*, 464 U.S. at 23-24.

tions from members and supporters. See *United States* v. *Ellison*, 793 F.2d 942, 945, 950 (8th Cir.) (white supremacist group's arson was "intended to produce operating funds" and "bolster[ed] * * * members' morale and commitment to [the group]"), cert. denied, 479 U.S. 937 (1986). The court of appeals' analysis leaves entirely unclear how much economic benefit would be enough to convert "political" conduct falling outside RICO into "economic" conduct falling within the statute's reach.

Moreover, the inquiry required by the court of appeals conflicts with the longstanding principle that motive and purpose, while sometimes relevant evidence, are not generally elements of crimes. Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 927-928 (3d ed. 1982). See also *United States* v. *Pomponio*, 429 U.S. 10, 12-13 (1976); *United States* v. *Malinowski*, 472 F.2d 850, 855-856 (3d Cir.), cert. denied, 411 U.S. 970 (1973); *United States* v. *Cullen*, 454 F.2d 386, 392 (7th Cir. 1971) (Stevens, J.); *United States* v. *Moylan*, 417 F.2d 1002, 1004 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970). Whether acts of extortion are motivated by a long-term political purpose, or whether that purpose is being claimed in a given case as a conscious charade or subconscious pretense for more mundane criminal aims, is a difficult question to resolve, and it is irrelevant to the traditional concerns of the criminal law. It is also irrelevant to the policies of RICO, since the economic and societal effects of a pattern of extortion are identical irrespective of the motives of those involved.

After confronting those questions, the Second Circuit has disavowed any inquiry into "long-term pecuniary objectives which in some sense can be said to supersede accompanying political or religious ones."

United States v. *Bagaric*, 706 F.2d at 54-55. The Second Circuit, however, has continued to adhere to the vague formulation that "*some* financial purpose" is required by RICO. *United States* v. *Ferguson*, 758 F.2d at 853. As the court of appeals acknowledged in this case, Pet. App. A32-A33, that requirement conflicts with the Third Circuit's conclusion in *McMonagle*. See *McMonagle* v. *Northeast Women's Center, Inc.*, 493 U.S. 901 (1989) (White, J., dissenting from the denial of certiorari). There is no indication that the conflict will lessen with time, or that further consideration by the lower courts will shed any new light on the issue. Accordingly, we believe review is warranted to reconcile the conflicting decisions of the Second, Third, Seventh, and Eighth Circuits, and to make clear that RICO imposes no "economic purpose" or "motive" requirement.

4. Respondents contend that their conduct is not "extortion" under the Hobbs Act, 18 U.S.C. 1951, because they did not obtain any property from petitioners, and that the Court should therefore deny certiorari. See Terry Br. in Opp. 14-24. It is by no means clear that respondents' grudging interpretation of the Hobbs Act is correct, see, *e.g.*, *United States* v. *Green*, 350 U.S. 415, 418-420 (1956), but in any event the Court need not consider that question because it is not fairly included within the question presented by petitioners—*i.e.*, whether RICO imposes an "economic motive" requirement.

It is especially appropriate to assume the correctness of the Seventh Circuit's ruling against respondents on the Hobbs Act issue because the case comes to this Court on the pleadings, and therefore respondents may prevail only if it is "beyond doubt" that petitioners "can prove no set of facts" entitling them

to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). See also *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 249-250 (1989) (dismissal proper only "if 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations' "). As the RICO Case Statement makes clear, petitioners have undertaken to prove, *inter alia*, that respondents and their co-conspirators committed the "extortion" in question through a pattern of other crimes, including arson—a separate predicate under RICO. See 18 U.S.C. 1961(1)(A). Indeed, there is no indication that the court of appeals would construe RICO differently in a case in which the government or a private plaintiff relies on murder, arson, or kidnapping as predicate crimes. Thus, irrespective of the legal validity of petitioners' extortion theory, if the court of appeals erred in its construction of RICO, it is most assuredly not "beyond doubt" that petitioners can prove no set of facts entitling them to relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MIGUEL A. ESTRADA
Assistant to the Solicitor General

CYNTHIA A. YOUNG
Attorney

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In The

Supreme Court of the United States

October Term, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Petitioners,

v.

JOSEPH M. SCHEIDLER, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS RANDALL A. TERRY, PROJECT LIFE, AND OPERATION RESCUE IN RESPONSE TO THE BRIEF OF THE UNITED STATES

WALTER M. WEBER
(Counsel of Record)
Suite 520
1000 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 337-2273

VINCENT P. McCARTHY
8 South Main Street
New Milford, CT 06776
(203) 355-0923

LAWRENCE M. GAVIN
BELL, BOYD & LLOYD
Three First National Plaza
Suite 3000
70 W. Madison St.
Chicago, IL 60602
(312) 372-1121

Attorneys for Respondents Randall A. Terry, Project Life, and Operation Rescue

June 4, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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INTRODUCTION

The United States, as *amicus curiae*, has asked this Court to decide "[w]hether 18 U.S.C. §§ 1962(c) and (d) require proof of economic motivation either in the racketeering enterprise or in the racketeering acts." For the reasons set forth in their Brief in Opposition, Respondents Terry *et al.* continue to maintain that an economic motive is required under RICO and is not alleged in this case. Moreover, Respondents vigorously contest the Government's position that this is an appropriate case in which to decide the economic motive issue. It is not, for several reasons, not the least of which is that the purported "conflict" in the Circuits on which the Government relies is more apparent than real.

Resolution of the economic motive question is precluded by Petitioners' failure to allege any predicate acts under RICO. Petitioners did not allege extortion because they never claimed that Respondents "obtained" property from them within the meaning of the Hobbs Act, as interpreted by this Court last Term in *Evans v. United States*, 112 S. Ct. 1881 (1992). Further, Petitioners alleged no other predicate acts. Accordingly, Petitioners' RICO claims fail, regardless of how the "economic motive" question posed by the United States might be answered.

I. THIS IS NOT AN APPROPRIATE CASE IN WHICH TO DECIDE WHETHER RICO REQUIRES PROOF OF ECONOMIC MOTIVE

This is an inappropriate case for the Court to determine whether RICO requires proof of economic motive. First, contrary to the representations of the United States (Br. at 5, 6), there is no conflict in the Courts of Appeals on this question. Second, the Government makes no claim that the requirement of pleading and proving economic motive has hindered its ability to enforce RICO. Third, Congress is presently considering specific legislation addressing protest activities at abortion clinics, rendering it unnecessary to determine whether RICO should be extended to encompass such activities.

1. The United States has asked the Court to grant review solely to resolve an alleged conflict in the Courts of Appeals on whether 18 U.S.C. §§ 1962(c) and (d) require proof of economic

motivation either in the racketeering enterprise itself or in the racketeering acts. Three Circuits – the Second, Seventh and Eighth – have held that either the enterprise itself or the predicate acts must have some economic motive.[1] The Government cites the Third Circuit's decision in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), for the contrary proposition, that no economic motive is required either in the enterprise or the predicate acts. Br. at 5, 6. *McMonagle*, however, does not support that proposition. The issue in *McMonagle* was whether extortion under the Hobbs Act requires an economic benefit or motivation. Significantly, the Third Circuit did not even mention the line of cases on which the Government postulates its alleged conflict. The conflict, in fact, is nonexistent. No Circuit has held that RICO does not require proof of economic motive.[2]

2. The Brief of the United States takes issue with the reasoning of the Second Circuit in its decision in *United States v. Ivic*. Br. at 4, 7-11. *Ivic* was decided in 1983. Conspicuous by its absence from the Government's Brief is any claim that either *Ivic* or its progeny has compromised the Justice Department's ability to bring criminal RICO charges in appropriate cases over the past ten

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[1] *See United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983); *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983); *United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985); *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992); *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *United States v. Flynn*, 852 F.2d 1045 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988).

[2] Moreover, the district courts that have addressed this issue since the Seventh Circuit ruled in this case have uniformly followed that decision. *See Town of West Hartford v. Operation Rescue*, 792 F. Supp. 161, 168-69 (D. Conn. 1992), *vacated on other grounds*, No. 92-7595 (2d Cir. Apr. 21, 1993); *Webster v. Operation Rescue*, No. 91-C-20138 (N.D. Ill. Oct. 9, 1992) (1992 WL 281366); *Lucero v. Operation Rescue of Birmingham*, No. CV91-PT-1082-S (N.D. Ala. Mar. 2, 1993); *Women's Pavilion, Inc. v. Morality*, No. 3:91CV7250 (N.D. Ohio Dec. 23, 1992). *Cf. Town of Brookline v. Operation Rescue*, 762 F. Supp. 1521, 1523 (D. Mass. 1991) (rejecting RICO claim for lack of injury to plaintiff and lack of Hobbs Act extortion). *But see Feminist Women's Health Center v. Roberts*, No. C86-161 (V)D (W.D. Wash. Mar. 11 and May 3, 1988) (1988 WL 156656), subsequent opinion, No. C86-161Z (W.D. Wash. May 5, 1989) (1989 WL 56017), *appeal pending*, Nos. 90-35266 and 90-35298 (9th Cir. argued Feb. 5, 1992) (*contra*).

years. That alone strongly suggests that there is no pressing need for the Court to decide the economic motive question at this time.

3. Finally, any suggestion that the Government needs a broader reading of RICO in order to deal effectively with abortion protests simply overlooks the other weapons available in the Government's armamentarium. Congress is presently considering legislation that would make it a felony to interfere with access to abortion clinics.[3] And it is already a federal crime to burn or bomb "any building . . . or other real . . . property used in interstate . . . commerce or in any activity affecting interstate . . . commerce." 18 U.S.C. § 844(i). In sum, there is no persuasive reason for the Court to grant review of the RICO question presented.

II. RESOLUTION OF THE ECONOMIC MOTIVE QUESTION IS PRECLUDED BY PETITIONERS' FAILURE TO ALLEGE ANY PREDICATE RACKETEERING ACTS UNDER RICO.

The threshold and dispositive issue in this case, which the Government relegates to the end of its Brief, is whether Petitioners have properly pleaded extortion under the Hobbs Act, the only predicate acts alleged in support of their RICO claims. If, as Respondents contend, they have not, then there is no need for the Court to address the economic motive issue.

A. The Economic Motive Question Cannot Be Considered In Isolation From The Dispositive, Threshold Question Of The Sufficiency Of Petitioners' Extortion Claims.

The United States suggests that the extortion issue is not properly before the Court "because it is not fairly included within the question presented by petitioners." Br. at 15. But the rule to which the Government apparently refers – Supreme Court Rule 21.1(a) – is a limitation on *Petitioners*, not *Respondents*. The prevailing party – respondent or appellee – "may rely upon any

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[3] *See* S. 636, the "Freedom of Access to Clinic Entrances Act of 1993," H.R. 796, the "Freedom of Access to Reproductive Services Act of 1993," 103rd Congress, 1st Sess.

matter appearing in the record in support of the judgment below." *Blum v. Bacon,* 457 U.S. 132, 137 n.5 (1982). This is true "whether or not that ground was relied upon or even considered by the trial court," *Dandridge v. Williams,* 397 U.S. 471, 475 n.6 (1970), or even if "his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *Id.*

The extortion issue cannot be avoided as it is a " 'predicate to an intelligent resolution' " of the Petitioners' RICO claim. *Cuyler v. Sullivan,* 446 U.S. 335, 342-43 n.6 (1980) (quoting *Vance v. Terrazas,* 444 U.S. 252, 258-59 n.5 (1980)). If no RICO predicate acts were properly pleaded, there is no RICO cause of action and therefore no need to determine whether the enterprise itself or the predicate acts require an economic motive.

B. Petitioners Did Not Allege Extortion Because They Never Claimed That Respondents "Obtained" Property From Them Within The Meaning Of The Hobbs Act.

Petitioners alleged that Respondents "did wrongfully use threatened or actual force, violence or fear to induce or attempt to induce the employees of affected clinics *to give up* their jobs; doctors involved with affected clinics *to give up* their economic right to practice medicine at the plaintiff clinics; patients of affected clinics *to give up* their right to obtain services at the plaintiff clinics; and prospective patients of clinics *to give up* their constitutional right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force." Second Amended Complaint, ¶¶97, 98(d), Resp. Scheidler *et al* Br. Opp. at 24a-25a (emphasis supplied). These allegations fall far short of what is required to plead Hobbs Act violations.

The Hobbs Act defines extortion as:

> the *obtaining* of property *from* another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. § 1951(b)(2) (emphasis supplied). It is a fundamental rule of interpretation to begin with the text of the statute. *United States v. Turkette,* 452 U.S. 576, 580 (1981). Words are to be given

their ordinary meaning. *Russello v. United States*, 464 U.S. 16, 21 (1983). The Oxford English Dictionary, vol. 10, 669-70 (2nd ed. 1989), traces the development of the uses of "obtain" through the history of the English language. Its principal sense is "to come into the possession or enjoyment of (something) . . . , to acquire [or] get." *Id.* "Obtaining . . . from" is not synonymous with "part with," which means "to let go, give up [or] surrender." *Id.* vol. 11 at 262.

Just last Term, all nine Justices of this Court agreed that the Hobbs Act is based upon New York law and incorporates the elements of extortion at common law. *See Evans v. United States*, 112 S. Ct. 1881, 1885 (1992). One of those elements is that the defendant must "obtain" property from another; it is not enough to plead and prove that the defendant "deprived" someone of his property. But Petitioners have pleaded only that Respondents "deprived" them of property. They never pleaded that Respondents (or anyone associated with them) "obtained" their property.

The Hobbs Act took its relevant language from the New York Penal Code. *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973).[4] *See also United States v. Addonizio*, 451 F.2d 49, 72 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972) (citing *United States v. Nedley*, 255 F.2d 350, 355-58 (3d Cir. 1958), and following New York law). In *Nedley*, the Third Circuit squarely held, in accord with New York law, that "obtaining" was synonymous with "taking" and that "robbery" in the Hobbs Act did *not* extend to "interference by force and violence with . . . lawful dominion and control," since no "taking" or no "intent to steal" could be shown. 255 F.2d at 354-57. The court observed:

> We cannot subscribe to the proposition that Congress intended by the inclusion of the word "obtain" to scrap centuries-old concepts of the elements of a felony such as robbery and to obliterate requirements of "taking" and "carrying away [or the appropriate state of mind]."

Id. at 356.

Under New York law, it is well-settled that an unlawful taking is required in the law of extortion. *People v. Whaley*, 6 Cow. 661,

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[4] The relevant legislative materials are ably stated and reviewed in *United States v. Mazzei*, 521 F.2d 639, 651-55 (3d Cir.) (Gibbons, J., dissenting), *cert. denied*, 423 U.S. 1014 (1975).

663 (N.Y. 1827) ("[e]xtortion. . . . signifies the taking of money" with corrupt intent) (cited in commentary to Field Code of 1865, § 613 (extortion)). In *People v. Ryan*, 232 N.Y. 234, 235, 133 N.E. 572, 573 (1921), a prosecution for blackmail, in which an intent "to extort" was required, the New York Court of Appeals held that a threat to injure a business without an accompanying intent to "gain money or property" did not fall within the scope of the statute.

Petitioners' allegations of extortion are limited to claims that clinics, doctors or patients were deprived of property (or of the ability to exercise certain rights). But "to deprive" is simply not the same as "to obtain from." Respondents were not business competitors of the clinics or their employees. They stood to gain nothing by the reduction in the clinics' business. No claim was made that Respondents were motivated by a desire to "obtain from" anyone property, tangible or intangible. Even assuming, *arguendo*, that those who were associated with the clinics lost "property" (*but see* Resp. Terry *et al.* Br. Opp. § IV(B)) and that their patients may have been frustrated in the attempt to exercise their "rights", neither the protesters nor anyone associated with them gained that "property" or exercised those "rights". Nor did any third party gain the clinics' property. Thus, the crime of "extortion" simply does not fit the alleged conduct. *See, e.g., People v. Squillante*, 18 Misc. 2d 516, 564, 185 N.Y.S.2d 357, 361 (1959) (" '[o]btaining of property from another' imports not only that he give up something but that the obtainer receive something").[5] Whatever else Respondents might have been, they were not "extortionists."

Far from casting doubt on Respondents' interpretation of extortion, *United States v. Green*, 350 U.S. 415 (1956), cited by the United States, Br. at 15, confirms the distinction which Respondents make but which the Third Circuit in *McMonagle* and the court below overlooked. In *Green*, this Court clearly cited the Hobbs Act definition of extortion, requiring "obtaining," and noted that "[t]he extortions alleged consisted of attempts to obtain . . . . " *Id.* at 417. The issue in *Green* was not the meaning of "extortion"

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[5] The opinion in *Squillante* is entitled to particular weight because, as previously noted, the Hobbs Act was based on New York law. *See United States v. Enmons*, 410 U.S. at 406 n.16.

but whether there was a "labor exception" to the Hobbs Act or whether the Act applied to the employer-employee relationship and unions. *See United States v. Green*, 135 F. Supp. 162, 163 (S.D. Ill. 1955). The Court there identified the appropriate distinction in concluding that "extortion as defined in the statute in no way depends upon having a *direct benefit* conferred on the person who *obtains* the property." *Id.* at 420 (emphasis supplied). Obviously, the lack of necessity for one factor (direct benefit) cannot negate the presence of a different statutory requirement (obtain).[6]

The allegations of "extortion" in the Second Amended Complaint simply disregard the common law requirement of "taking" or "obtaining" incorporated into the Hobbs Act. Essentially, Petitioners' theory of extortion is that any garden-variety political protest aimed at an industry causes extortion to the extent that it adversely influences businesses and consumers. If businesses sell less, if consumers buy less, if fewer employees are employed, that is "extortion" of each of them. The extorter need *obtain* nothing; it is sufficient if the businesses, consumers, or employees are deprived of (or "give up") something. Finally, under this theory, the very nature of protest supplies the element of "actual or threatened force or fear." This theory profoundly contradicts the clear principle of the First Amendment that "[s]peech does not lose its protected character, however, simply because it may embarrass

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[6] The Third Circuit holding in *McMonagle* that no economic benefit or motivation is necessary in pleading and proving a Hobbs Act violation is clearly wrong. None of the decisions it cited supports its holding. *United States v. Cerelli*, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980), merely held that the extortionist need not obtain the property himself – a political party may be the recipient of the extorted contributions. *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975), held that a religious purpose does not preclude a finding of extortion where money is taken. Finally, *United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983), dealt not with the "obtaining from" element of extortion, but with the failure to give kidnapping instructions. The record, however, included evidence that defendant had extorted $300 from the victim. Curiously, the Third Circuit failed to cite its own controlling precedent recognizing that extortion under the Hobbs Act was a "larceny-type offense." *United States v. Sweeney*, 262 F.2d 272, 275 (3d Cir. 1959) (citing *United States v. Nedley*, 255 F.2d 350 (3d Cir. 1958)). *McMonagle*, in short, is unpersuasive. The court below referred to *McMonagle's* holding in passing, but without independently addressing this issue.

others and coerce them into action." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). *See also* Resp. Scheidler Br. Opp. at 26 n.15. Petitioners failed to allege any violations of the Hobbs Act.

C. Petitioners Did Not Allege Any Other Predicate Acts And Are Bound By Their Pleadings.

Over the course of several years of litigation and extensive discovery, Petitioners filed four complaints and one RICO case statement. Not one of these pleadings alleged any predicate racketeering activity other than extortion under the Hobbs Act.

Petitioners' Second Amended Complaint contained three RICO counts. The first RICO count, based on 18 U.S.C. § 1962(a), alleged that Respondents had committed "predicate offenses in violation of 18 U.S.C. Section 1951 (the 'Hobbs Act')." Second Amended Complaint, ¶97, Resp. Scheidler Br. Opp. at 24a. The following paragraph listed a series of acts allegedly committed by Respondents or their "co-conspirators," all of which were said to constitute "extortion". Second Amended Complaint, ¶98, Resp. Scheidler Br. Opp. at 25a-28a. The second RICO count, based on 18 U.S.C. § 1962(c), cross-referenced the same alleged acts of extortion pleaded under the first RICO count and referred to Respondents' alleged "violation of 18 U.S.C. Section 1968(c) [*sic*]." Second Amended Complaint, ¶109, Resp. Scheidler Br. Opp. at 30a-31a. The third RICO count, based on 18 U.S.C. § 1962(d), also cross-referenced the earlier paragraphs and alleged that Respondents had "agreed to the commission of extortionate acts." Second Amended Complaint, ¶¶112, 113, Resp. Scheidler Br. Opp. at 31a. No other predicate acts were alleged.

Petitioners also filed a RICO case statement which contained two exhibits listing dozens of alleged incidents at abortion businesses, in which Respondents or their myriad alleged "co-conspirators" were purportedly involved. Although the Government correctly observes that one of these offenses – arson – is a separate predicate offense under RICO, Br. at 16, it erroneously intimates that Petitioners pleaded arson as a separate predicate offense in their RICO case statement. They did not. The only distinct predicate racketeering acts alleged in the RICO case statement were

extortion under the Hobbs Act. RICO case statement at 2-6, 8-10. Indeed, after cross-referencing their exhibits, Petitioners state: "These acts violate the Hobbs Act, 18 U.S.C. § 1951." *Id.* at 5. Later in their RICO case statement Petitioners stated that the *only* racketeering activities alleged were violations of the Hobbs Act: "The predicate acts listed in Exhibits A and B . . . violate the Hobbs Act, 18 U.S.C. § 1951. Hobbs Act violations are in turn deemed racketeering activity under RICO. 18 U.S.C. § 1951." *Id.* at 8.[7]

The only racketeering activity Petitioners pleaded was extortion under the Hobbs Act. The United States appears to suggest that Petitioners should be allowed to replead predicate acts never asserted, citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), and *H.J. Inc. v. Northwestern Bell. Tel. Co.*, 492 U.S. 229, 249-50 (1989). Br. at 16. But nothing in either case requires Respondents to be subjected to endless rounds of repleaded complaints while Petitioners vainly search for facts to fit their legal theory. *See Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983).

Petitioners are bound by their RICO case statement. *Marriott Brothers v. Gage*, 911 F.2d 1105, 1108 (5th Cir. 1990); *Guidry v. Bank of LaPlace*, 954 F.2d 278, 283 n.5 (5th Cir. 1992). Failing to allege predicate acts either in any of their complaints or in their RICO case statement, Petitioners' Second Amended Complaint was properly dismissed. *Miranda v. Ponce Federal Bank*, 948 F.2d 41 (1st Cir. 1991); *Glessner v. Kenny*, 952 F.2d 702 (3d Cir. 1991). And dismissal with prejudice was appropriate where Petitioners had repeated opportunities to plead proper predicate offenses, failed to do so and never sought leave to amend to correct deficiencies in their pleadings. *McLaughlin v. Anderson*, 962 F.2d 187, 195 (2d Cir. 1992).

Since Petitioners did not properly plead any predicate acts, this case presents no occasion for the Court to consider the question addressed by the United States, *i.e.*, whether RICO

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[7] Petitioners never claimed in the District Court, the Seventh Circuit or this Court that they pleaded any predicate racketeering acts other than extortion under the Hobbs Act. *See e.g.*, Pet. Rep. Br. at 2 n.2 (citing par. 98(a)-(1) of the Second Amended Complaint as "detail[ing] some of the acts of extortion").

requires proof of economic motivation either in the racketeering enterprise or in the racketeering acts. Accordingly, the petition for *certiorari* should be denied.

CONCLUSION

The petitioner for a writ of *certiorari* should be denied.

Respectfully submitted,

WALTER M. WEBER
(Counsel of Record)
Suite 520
1000 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 337-2273

VINCENT P. MCCARTHY
8 South Main Street
New Milford, CT 06776
(203) 355-0923

LAWRENCE M. GAVIN
BELL, BOYD & LLOYD
Three First National Plaza
Suite 3000
70 W. Madison St.
Chicago, Illinois 60602
(312) 372-1121

Attorneys for Respondents Randall A. Terry, Project Life, and Operation Rescue

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No. 92-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Petitioners,

v.

JOSEPH M. SCHEIDLER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

WALTER M. WEBER
Counsel of Record
1000 Thomas Jefferson Street, N.W.
Suite 520
Washington, D.C. 20007
(202) 337-2273

THOMAS L. BREJCHA
Counsel of Record
ABRAMSON & FOX
One East Wacker Drive
Suite 3800
Chicago, Illinois 60601
(312) 644-8500

CRAIG L. PARSHALL
Counsel of Record
THE RUTHERFORD INSTITUTE
910 Princess Anne Street
The Law Building/Suite 105
Fredericksburg, Virginia 22401
(703) 371-4140

Counsel for the Respondents

FAY CLAYTON
Counsel of Record
SUSAN VALENTINE
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

Counsel for the Petitioners

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PETITION FOR CERTIORARI FILED NOVEMBER 2, 1992
CERTIORARI GRANTED JUNE 14, 1993

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The following Opinions, Decisions, Judgments, and Orders have been omitted in printing this Joint Appendix because they appear on the following pages in the Petition for Writ of Certiorari:

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Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, May 20, 1991	B-1
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Order of the United States Court of Appeals for the Seventh Circuit Denying the Petition for Rehearing, August 4, 1992	G-1

RELEVANT DOCKET ENTRIES

I. U. S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION -- No. 86 C 7888

Date	No.	Proceedings
10/17/86	01	COMPLAINT * * *
* * *		
01/23/87	18	MOTION TO DISMISS filed by Defendants Joseph M. Scheidler and Pro-Life Action League, Inc. * * *
* * *		
07/02/87	42	ORDER denying Defendants' motion to dismiss; status hearing set for 07/15/87, at 10:00 a.m. * * *
* * *		
07/20/87	44	JOINT MOTION FOR RECONSIDERATION Or, In the Alternative, for Amendment of Order to Provide for Certification Pursuant to 28 U.S.C. § 1292(b) * * *

Date	No.	Proceedings
	* * *	
10/01/87	55	ORDER denying Defendants' motion to reconsider; denying Defendants' motion for certification under § 1292(b); Status hearing set for 10/27/87, at 10:00 a.m. * * *
10/19/87	56	ANSWER AND ADDITIONAL DEFENSES of Defendants Ryan and PDAL to Plaintiffs' Complaint * * *
10/20/87	57	ANSWER of Defendants Scheidler and PLAL * * *
	* * *	
12/24/87	61	MOTION FOR CLASS CERTIFICATION, filed by Plaintiffs * * *

Date	No.	Proceedings
01/08/88	62	ORDER entering Interim Protective Order; no documents will be filed with the Court; Defendants to file preliminary response to motion for class certification on or before 01/22/88; Status hearing held; Continued to 02/11/88, at 10:00 a.m. * * *
01/08/88	63	INTERIM PROTECTIVE ORDER * * *
* * *		
01/27/88	73	MOTION TO DEFER CONSIDERATION of Class Certification Issues, filed by Defendants Scheidler and PLAL * * *
* * *		
02/11/88	76	ORDER deferring consideration of class determination; Status hearing held; Continued to 04/13/88, at 10:00 a.m. * * *

Date	No.	Proceedings
	* * *	
07/07/88	95	ORDER: Parties to submit in camera in chambers letters regarding respective positions on protective order and settlement; Responses are due 08/03/88, by 12:00 noon; Status hearing held; Pretrial conference set for 08/03/88, at 4:30 p.m. * * *
	* * *	
08/03/88	98	ORDER: Pretrial conference held; Plaintiff to submit protective order proposal by 08/10/88; Defendants to submit response by 08/17/88; Court will rule by mail and set next status date in that ruling * * *
08/10/88	99	MOTION TO VACATE INTERIM PROTECTIVE ORDER and Enter Permanent Protective Order and Memorandum in Support thereof, filed by Plaintiffs * * *

Date	No.	Proceedings
	* * *	
09/01/88	104	ORDER granting leave to file, instanter, Defendants' motion for leave to file a response to Plaintiffs' motion to vacate interim protective order and enter permanent protective order in combination with memorandum in support of said Defendants' motion for entry of permanent protective order; Motion of Defendants Scheidler and PLAL for entry of a permanent protective order; Affidavit of Scheidler in support of Defendants' motion for entry of permanent protective order * * *
	* * *	
09/01/88	107	MOTION FOR ENTRY OF PERMANENT PROTECTIVE ORDER, filed by Defendants Scheidler and PLAL * * *

Date	No.	Proceedings
	* * *	
09/01/88	109	AFFIDAVIT of Joseph Scheidler in support of Defendants' motion for entry of permanent protective order (Exhibits A-I) * * *
10/20/88	110	ORDER: Enter memorandum opinion and order that the Court will enter a protective order; Status hearing set for 11/22/88. at 10:00 a.m. (For further detail, see order attached to the original minute order form.) * * *
10/20/88	111	ORDER: Memorandum Opinion and Order entered * * *
10/20/88	112	ORDER: Enter permanent protective order (For further detail, see order attached to the original minute order form.) * * *
10/20/88	113	ORDER: Permanent protective order entered * * *

Date	No.	Proceedings
	* * *	
11/22/88	130	PLAINTIFFS' NOTICE OF DEPOSITION of Frank Avila on 12/08/88, at 10:00 a.m. * * *
11/22/88	131	PLAINTIFFS' NOTICE OF DEPOSITION of Lucy O'Keefe on 12/08/88, at 10:00 a.m. * * *
11/22/88	132	PLAINTIFFS' NOTICE OF DEPOSITION of Charlene Crommett on 12/08/88, at 10:00 a.m. * * *
11/23/88	133	PLAINTIFFS' NOTICE OF DEPOSITION of Timothy Murphy on 12/08/88, at 10:00 a.m. * * *
	* * *	
12/05/88	140	PLAINTIFFS' NOTICE OF DEPOSITION of Lucy O'Keefe on 12/22/88, at 10:00 a.m. * * *
12/08/88	141	ORDER denying Defendants' motion for protective order to defer the taking of depositions * * *

Date	No.	Proceedings
	* * *	
12/08/88	144	PLAINTIFFS' NOTICE OF DEPOSITION of Frank Avila on 12/16/88, at 10:00 a.m. * * *
	* * *	
01/04/89	147	MOTION TO EXTEND TIME in Which to File Motion for Leave to File Amended Complaint * * *
	* * *	
01/24/89	149	ORDER granting leave to file First Amended Complaint, instanter; Responsive pleadings are due 03/24/89; Brief in support of motion due 03/24/89; Answer brief to motion due 04/24/89; Reply to answer brief due 05/24/89; Status hearing held * * *
01/24/89	150	MOTION FOR LEAVE to File First Amended Complaint (Exhibit) * * *
	* * *	
01/24/89	154	ORDER denying motion of certain Defendants to modify the permanent protective order * * *

Date	No.	Proceedings
02/02/89	155	AMENDED COMPLAINT * * *
* * *		
04/12/89	185	ORDER: All Defendants granted to 06/12/89 to answer or otherwise plead; Official service list to be filed on or before 06/01/89; Leave granted to Craig Parshall to appear pro hac vice for Monica Migliorino; Status hearing held; Continued to 06/12/89, at 10:00 a.m. * * *
* * *		
06/12/89	198	MOTION TO DEFER certain Defendants' response to the Amended Complaint pending Plaintiffs' compliance with outstanding discovery * * *
* * *		
06/12/89	201	MOTION TO DISMISS AMENDED COMPLAINT, filed by Defendant Conrad Wojnar * * *

Date	No.	Proceedings
	* * *	
06/23/89	203	RESPONSE of Defendants Ryan and PDAL to Plaintiffs' Motion to Extend Time to Respond to Their Discovery Requests * * *
06/27/89	204	ORDER granting Plaintiffs to and including 07/18/89, to answer outstanding discovery; Defendant Wojnar granted to 07/05/89 to file supplemental brief in support of motion to dismiss; Status hearing held; Continued to 07/19/89, at 10:00 a.m. * * *
	* * *	
08/14/89	217	MOTION TO DISMISS with Prejudice the Claims of the Ladies Center of Pensacola, Inc. and Response to Motion for Voluntary Dismissal (Exhibit A), filed by Defendants Scheidler, Scholberg, Murphy, and Pro-Life Action League, Inc. * * *

Date	No.	Proceedings
	* * *	
08/30/89	224	ORDER: Ladies Center of Pensacola as a class representative is dismissed with prejudice; Status hearing held; Continued to 09/20/89, at 10:00 a.m. * * *
09/14/89	225	ORDER: Filed motion for leave to file in excess of twenty interrogatory questions; Defendant Vital-Med Laboratories, Inc.'s motion to serve interrogatories in excess of twenty is entered and continued to 09/20/89, at 10:00 a.m. * * *
	* * *	
09/19/89	229	MOTION TO COMPEL DISCOVERY of Defendants Ryan and PDAL * * *

Date	No.	Proceedings
	* * *	
09/20/89	231	ORDER: Filed Plaintiffs' motion to compel Wojnar to respond to Plaintiffs' discovery with the attached memorandum in support thereof; Defendant Wojnar granted to 10/04/89 to file response to motion to compel and its motion for protective order; Plaintiffs' reply re its motion to compel and answering brief to Wojnar's motion for protective order is due 10/18/89; Wojnar's reply to its motion for protective order is due 10/25/89 * * *
09/20/89	232	ORDER granting Plaintiff leave to file First Amended Complaint on 09/22/89; Status hearing held * * *
	* * *	
09/20/89	234	MOTION TO COMPEL Wojnar to Respond to Plaintiffs' Discovery (Exhibits) * * *

Date	No.	Proceedings
09/20/89	235	ORDER: Motion of Vital-Med to serve more than twenty interrogatories is moot; Parties have worked it out * * *
09/22/89	236	SECOND AMENDED CLASS ACTION COMPLAINT * * *
* * *		
10/04/89	238	MOTION FOR PROTECTIVE ORDER and Response to Plaintiffs' Motion to Compel Wojnar to Respond to Plaintiffs' Discovery (Exhibits) * * *
10/11/89	239	ORDER; Filed Defendants Ryan's and PDAL's motion for protective order and memorandum in support of their motion for a protective order and in response to Plaintiffs' motion to compel discovery and certificate of service; Plaintiffs' answering brief to Ryan's and PDAL's motion for protective order and motion to compel; Reply is due 10/25/89 * * *

Date	No.	Proceedings
10/11/89	240	MOTION FOR PROTECTIVE ORDER and Memorandum in Support of Their Motion for a Protective Order in Response to Plaintiffs' Motion to Compel Discovery, filed by Defendants Ryan and PDAL * * *
10/11/89	241	ORDER: Filed motion of defendant Migliorino to stay discovery pending resolution of related motions for protective order; Deposition to proceed * * *
10/11/89	242	MOTION of Defendant Monica Migliorino to Stay Discovery Pending Resolution of Related Motions for Protective Orders, Or in the Alternative, for a Protective Order to Limit the Scope of Discovery * * *

Date	No.	Proceedings
10/18/89	243	REPLY IN SUPPORT OF MOTION TO COMPEL DISCOVERY from Ryan and PDAL and Response to Ryan's and PDAL's Motion for a Protective Order (Exhibit), filed by Plaintiffs * * *
* * *		
12/20/89	248	ORDER denying Defendants' motions for a protective order; Defendants Wojnar, Ryan and PDAL respond to discovery on or before 01/19/90; Plaintiffs granted to 01/05/90 to file answering brief to motion of defendant Wojnar to dismiss; Reply is due 01/19/90 * * *
* * *		
03/27/90	257	ORDER granting Plaintiffs' motion to compel Defendants Scheidler, Scholberg, Murphy, PLAL, Terry, Project Life, and Operation Rescue to answer interrogatories; Scheidler is directed to appear for continued deposition * * *

Date	No.	Proceedings
	* * *	
04/16/90	259	ORDER: Vital-Med Laboratories' motion to dismiss is taken under advisement; Answer brief to motion due 05/04/90; Reply to answer brief due 05/18/90 * * *
	* * *	
04/16/90	261	MOTION TO DISMISS * * *
	* * *	
04/23/90	268	ORDER denying Defendant Wojnar's motion to dismiss the Amended Complaint; Responsive pleading is due 05/07/90; Status hearing set for 05/17/90, at 10:00 a.m. (For further detail, see order on reverse of the original minute order form.) * * *

Date	No.	Proceedings
	* * *	
05/03/90	271	ORDER: Filed Plaintiffs' motion to bar Randall Terry from waiving the Fifth Amendment at trial with respect to questions on which he refused to testify at his deposition; Response to Plaintiffs' motion to bar Randall Terry from waiving the Fifth Amendment at trial is due by 05/18/90; Reply is due 06/01/90 * * *
	* * *	
05/03/90	273	ORDER: Filed motion to compel Scheidler, Scholberg, Murphy, and PLAL to respond to discovery requests; Defendants Scheidler, Scholberg, Murphy, and PLAL are granted to the close of business on 05/07/90 to respond to discovery requests * * *
	* * *	
05/07/90	277	ANSWER AND AFFIRMATIVE DEFENSES to Plaintiffs' Second Amended Class Action Complaint by Defendant Wojnar * * *

Date	No.	Proceedings
	* * *	
05/22/90	287	AMENDED ANSWER TO SECOND AMENDED CLASS ACTION COMPLAINT and Affirmative Defenses, filed by Conrad Wojnar * * *
	* * *	
06/01/90	292	MOTION TO COMPEL Defendants Randall Terry, Operation Rescue and Project Life to Respond to Discovery (Exhibits) * * *
	* * *	
06/18/90	294	ORDER: Filed Defendants Scheidler's, Scholberg's Murphy's, and PLAL's motion to compel the early appearance of Susan Hill for deposition and for certain other relief; Hill deposition to begin 07/24/90; Responsive pleading to the Complaint is due 07/26/90; Response to motion to compel Randall Terry to respond to discovery is due 07/06/90; Reply is due 07/20/90; Status hearing held; Continued to 07/27/90, at 10:00 a.m. * * *

Date	No.	Proceedings
	* * *	
07/02/90	297	AMENDED MOTION FOR CLASS CERTIFICATION (Exhibit), filed by Plaintiffs * * *
	* * *	
07/19/90	303	ORDER: Enter memorandum opinion and order that the Court defers ruling on Plaintiffs' motion for an order in limine prohibiting Mr. Terry from waiving Fifth Amendment at trial (For further detail, see order attached to the original minute order form.) * * *
07/18/90	304	MEMORANDUM OPINION AND ORDER * * *

Date	No.	Proceedings
07/18/90	305	ORDER: This case is currently pending on [judge's] calendar; It is recommended to the executive committee that this case be referred to the calendar of Magistrate Weisberg; the magistrate designated pursuant to general rule 2.41(b); The reasons for recommendation are to hear and enter order(s) on discovery motion(s), all further discovery matters, including those presently being briefed, shall be presented to Mag. Weisberg for resolution * * *
07/23/90	306	MOTION FOR PROTECTIVE ORDER with regard to Vital-Med by Plaintiffs; Court rules orally on motion for protective order; Any questions arising out of deposition to be presented to Magistrate Weisberg * * *

Date	No.	Proceedings
	* * *	
07/27/90	312	ORDER: Pursuant to stipulation, Ryan Defendants granted to and including 08/27/90 to answer or otherwise plead to the Second Amended Complaint; Leave granted to Defendant Migliorino to file answer instanter; Status hearing held; Continued to 11/01/90, at 10:00 a.m. * * *
	* * *	
07/27/90	314	ANSWER TO SECOND AMENDED COMPLAINT, filed by Defendant Migliorino * * *
07/27/90	315	ORDER: File Defendants Scheidler's, PLAL's, Scholberg's, and Murphy's Motion for Brief Extension Until 07/31/90 Within Which to Answer or Otherwise Plead; Scheidler Defendants granted to 07/31/90 to file responsive pleadings to Second Amended Complaint with supporting brief up to 30 pages in length * * *

Date	No.	Proceedings
	* * *	
07/31/90	320	ORDER denying Vital-Med's motion to dismiss Counts I and VII of Second Amended Complaint (For further detail, see order on the reverse of the original minute form.) * * *
07/31/90	321	PLAINTIFFS' NOTICE OF DEPOSITION of Des Plaines Pro Life on 08/17/90 (Attachment) * * *
	* * *	
08/20/90	326	ANSWER TO SECOND AMENDED CLASS ACTION COMPLAINT, filed by Defendant Vital-Med Laboratories, Inc. * * *

Date	No.	Proceedings
	* * *	
08/24/90	329	MOTION TO DISMISS SECOND AMENDED CLASS ACTION COMPLAINT, filed by Defendants Ryan and PDAL; Affidavit of Timothy Belz on Behalf of John Patrick Ryan and PDAL (Exhibits); Affidavit of John Patrick Ryan; Affidavit of Ann Lamb O'Brien on Behalf of PDAL * * *
	* * *	
08/29/90	331	ORDER granting leave to Defendants Scheidler, PLAL, Scholberg, and Murphy to file motion to dismiss instanter; Plaintiffs' motion for default against said Defendants is moot; Answer brief to motion due 09/07/90; Reply to answer brief due 09/14/90 * * *

Date	No.	Proceedings
	* * *	
08/29/90	335	MOTION TO DISMISS SECOND AMENDED CLASS ACTION COMPLAINT, Or in the Alternative, for More Definite Statement and Motion to Strike Certain Allegations Relating to Former Plaintiff The Ladies Center, Inc., Or in the Alternative, to Vacate Prior Order Dismissing Said Party and to Compel Discovery (Attachments), filed by Defendants * * *
08/29/90	336	MEMORANDUM IN SUPPORT of Defendants' Motion to Dismiss Second Amended Class Action Complaint, Or in the Alternative, for More Definite Statement and for Certain Additional Relief * * *
	* * *	
09/06/90	341	ORDER: Telephone conference held on discovery deposition disputes; Oral rulings delivered * * *

Date	No.	Proceedings
	* * *	
09/07/90	343	RESPONSE to PLAL Defendants' Motion to Dismiss Second Amended Complaint (Attachments) * * *
	* * *	
09/18/90	348	ANSWER TO SECOND AMENDED CLASS ACTION COMPLAINT, filed by Randall Terry, Project Life and Operation Rescue * * *
	* * *	
09/27/90	350	ORDER: Hearing held on discovery disputes; Oral rulings given * * *
09/28/90	351	ORDER: Telephone conference held on discovery disputes in the course of Scheidler deposition; Parties to present their positions by motion * * *
10/05/90	352	RESPONSE by Plaintiffs to PDAL Defendants' Motion to Dismiss Second Amended Complaint * * *

Date	No.	Proceedings
10/18/90	353	PLAINTIFFS' NOTICE OF DEPOSITION of Craig Edwards on 11/15/90 at 10:00 a.m. * * *
10/18/90	354	PLAINTIFFS' NOTICE OF DEPOSITION of Edward Cottrell on 11/15/90 at 2:00 p.m. * * *
* * *		
11/01/90	360	OBJECTIONS AND RESPONSES of Defendants Scheidler, PLAL, Scholberg, and Murphy to Plaintiffs' Motion to Set Ruling Date on Their Pending Motion to Dismiss, Request for Oral Argument on Said Motion Failing Acceptance of a Reply Brief, Suggestion of Additional Authorities in Support of Said Motion, Supplemental Motion for Entry of an Order Requiring that Plaintiffs Submit Both a "RICO Case Statement" and a Specification of Their Federal Antitrust Claims Pursuant to Federal Rule 16 * * *

Date	No.	Proceedings
	* * *	
11/01/90	365	ORDER: Motion for default against Operation Rescue and Project Life is entered and continued to 12/14/90, at 10:00 a.m.; Discovery as to capacities of said Defendants to be completed by 12/14/90 * * *
	* * *	
11/01/90	367	ORDER denying Plaintiffs' motion to set ruling date on PLAL Defendants' motion to dismiss; Court will rule by mail; Plaintiffs' additional material is due 11/15/90 * * *
	* * *	
11/06/90	373	ORDER granting Defendants' motion to supplement memoranda in support of Defendants' motion to suppress the Terry deposition; Rulings entered on certain Defendants' motion to suppress transcript of Terry deposition and Plaintiffs' motion for attorneys' fees (see attached rulings); Discovery conference held; Status hearing set for 03/12/91, at 10:00 a.m. * * *

Date	No.	Proceedings
	* * *	
11/15/90	375	MOTION, Pursuant to Rule 37(a)(2) and (4) Fed. R. Civ. P., for an Order compelling Defendants to Answer Plaintiffs' Interrogatory and Costs (Exhibits) * * *
11/15/90	376	ORDER: Plaintiffs' motion to compel defendants to answer Plaintiffs' interrogatory is entered and continued; Defendants' response due 11/26/90; Plaintiffs' reply due 12/06/90; Ruling set for 12/27/90, at 10:00 a.m. * * *
11/16/90	377	OBJECTIONS AND MOTION TO RECONSIDER Magistrate Weisberg's ruling to the extent that it denied Defendants' request for suppression of the Terry deposition by Defendants Murphy, Scheidler, PLAL, and Scholberg * * *

Date	No.	Proceedings
	* * *	
12/06/90	385	MOTION FOR LEAVE to File Response to Plaintiffs' Motion to Compel Answer to Interrogatory, to Defer Briefing Schedule Accordingly, and to Make In Camera Submission of Certain Original Documents (Exhibits), filed by all Defendants * * *
12/06/90	386	ORDER granting Defendants' Motion for Leave to File Response to Plaintiffs' Motion to Compel Answer to Interrogatory; and denying certain Defendants' motion for reconsideration of Magistrate Weisberg's ruling on their motion to suppress the Terry deposition * * *

Date	No.	Proceedings
12/06/90	387	RESPONSE by Plaintiffs National Organization for Women, Ladies Center of Pensacola, Delaware Women's Health Center, and Summit Women's Health Center to Plaintiffs' Motion to Compel Answers to Interrogatories * * *
	* * *	
12/06/90	389	MOTION by Plaintiffs National Organization for Women, Ladies Center of Pensacola, Delaware Women's Health Center, and Summit Women's Health Center to Remove "Confidential" Designation from Sections of Scheidler Deposition * * *
	* * *	
01/09/91	411	ORDER: Two telephone conferences held with counsel at deposition of Randall Terry; Oral rulings given on objections to deposition questions * * *
	* * *	
01/07/91	414	RULING ON PLAINTIFFS' MOTION to compel answer to interrogatories * * *

Date	No.	Proceedings
01/07/91	415	ORDER: Enter Plaintiffs' motion to lift protective order and Defendants' motion to strike Susan Hill affidavit; Defendants to file consolidated response to Plaintiffs' motion to strike protective order and Plaintiffs' previously entered motion to remove confidential designation by 01/11/91; Reply due 01/18/91; Ruling set for 02/12/91, at 10:00 a.m.; Ruling entered on Plaintiffs' motion to compel answer to interrogatories and Defendants' motion to strike Susan Hill affidavit * * *
* * *		
01/24/91	418	MOTION FOR LEAVE to File Interrogatories and Motion to Compel, filed by Defendant Vital-Med Laboratories * * *

Date	No.	Proceedings
	* * *	
01/24/91	420	MOTION by Plaintiffs NOW, Ladies Center of Pensacola, DWHO, and SWHO to Compel Defendants Scheidler, Murphy, Scholberg, and PLAL to Respond to Plaintiffs' Third Request for Production of Documents (Exhibits) * * *
	* * *	
01/25/91	422	ORDER denying motion of Defendants Ryan and PDAL to dismiss the Second Amended Class Action Complaint (For further detail, see order on the reverse of the original minute order form.) * * *

Date	No.	Proceedings
	* * *	
01/24/91	424	ORDER: Motion of certain defendants to serve answers to Jacksonville interrogatories, and file response to plaintiffs' motion to lift protective order and attorney client privilege submission, all instanter, granted without objection; Plaintiffs' reply due 02/04/91; Previously set ruling date of 02/12/91, at 10:00 a.m. will stand; 01/29/91 ruling date vacated; Defendants' motion for confidentiality of answers to interrogatories entered; Plaintiffs' response due 02/04/91; any reply due 02/15/91; Ruling set for 02/26/91, at 10:00 a.m. * * *
	* * *	
02/04/91	430	ORDER: Enter order that Plaintiff shall file by 02/25/91 a RICO Case Statement * * *
02/07/91	431	MOTION TO COMPEL Plaintiffs to produce witnesses for Rule 30(b)(6) deposition (Exhibits), filed by Defendants PDAL and Ryan * * *

Date	No.	Proceedings
02/07/91	432	ORDER denying motion to compel Plaintiffs to produce witnesses for Rule 30(b)(6) depositions (Exhibits); Status hearing held * * *
* * *		
02/13/91	435	MOTION FOR EXTENSION OF TIME Within Which to File a RICO Case Statement, filed by Plaintiffs * * *
* * *		
02/13/91	437	ORDER granting Plaintiffs' motion for extension of time within which to file a RICO Case Statement to 03/18/91; Defendants Ryan and PDAL are granted to and including 02/15/91 to answer Second Amended Complaint * * *
* * *		
02/15/91	444	ANSWER TO SECOND AMENDED CLASS ACTION COMPLAINT by Defendants PDAL and Ryan; Jury demand * * *

Date	No.	Proceedings
	* * *	
03/18/91	469	RICO CASE STATEMENT (Exhibits), filed by Plaintiffs * * *
	* * *	
04/11/91	484	ORDER: Regarding motion to compel Defendants Scheidler, Murphy, Scholberg and PLAL to respond to Plaintiffs' Third Request for Production of Documents (Exhibits) * * *
04/11/91	485	ORDER granting Plaintiffs' motion to compel Defendants Scheidler, Murphy, Scholberg, and PLAL to respond to Plaintiffs' third request for production of documents; Hearing held on Plaintiffs' motion to compel Defendants to respond to Plaintiffs' third request for production of documents; Defendants' motion to reconsider due 04/18/91; Court will rule by mail (For further detail, see order attached to the original minute order form.) * * *

Date	No.	Proceedings
04/11/91	486	ORDER denying Plaintiffs' motion for default judgment against certain Defendants (For further detail, see order on reverse side of the original minute order.) * * *
04/16/91	487	ORDER denying Motion of Scheidler Defendants for an order suppressing the transcript of the Randall Terry deposition of 03/14/90 and 03/15/90 is denied (For further detail, see order on the reverse of the original minute order form.) * * *
* * *		
05/22/91	498	PLAINTIFFS' NOTICE OF DEPOSITION of Westmont Police Department on 06/21/91 * * *
* * *		
05/28/91	500	MEMORANDUM, OPINION AND ORDER * * *
05/28/91	501	ORDER: Judgment entered * * *

Date	No.	Proceedings
05/28/91	502	ORDER: Enter memorandum opinion and order that Defendants' motion to dismiss Counts 1, 2-4 is granted; due to lack of pendent jurisdiction, Counts 5-7 are dismissed; This cause of action is dismissed in its entirety; All pending motions, except for Plaintiffs' pending motion for entry of final judgment on attorneys' fees is moot; Terminating case (For further detail, see order attached to the original minute order form.) * * *

II. U. S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, No. 91-2468

Date	Proceedings
02/19/92	ORAL ARGUMENT * * *
06/29/92	SLIP OPINION * * *
08/04/92	ORDER DENYING PETITION FOR REHEARING * * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,	
Plaintiffs,	**Civil Action No. 86 C 7888**
v.	**SECOND AMENDED**
JOSEPH M. SCHEIDLER, et al.,	**CLASS ACTION COMPLAINT**
Defendants.	

NATURE OF THE ACTION

1. This is a civil action pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26, and Section One of the Sherman Antitrust Act, 15 U.S.C. § 1; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962; and state law. Plaintiffs seek declaratory and injunctive relief and damages from defendants who have conspired, among themselves and with others, to drive women's health centers that perform abortions out of business through a pattern of concerted, unlawful activity.

2. In furtherance of their conspiracy, defendants and their co-conspirators have, *inter alia*, engaged in extortion against, threatened and intimidated clinic personnel and

patients; intruded upon the confidential relationship between, and invaded the privacy of, the clinics' personnel and patients; trespassed on clinic property, invaded clinics and damaged clinic equipment; blocked ingress and egress to clinics; destroyed clinic advertising; coordinated telephone campaigns to tie up clinic lines; set up appointments under false pretenses to keep legitimate patients from being able to make appointments, to cause clinics loss of income and to gain access to clinics; interfered directly with clinics' business relations, including but not limited to relations with patients, personnel, lessors, medical laboratories, and other providers of goods and services; and established competing pregnancy testing and counseling facilities in the vicinities of the clinics, sometimes in the same buildings where clinics are located, homes for pregnant women and, on information and belief, prenatal and delivery services, foster homes and private adoption agencies.

3. The National Organization for Women ("NOW") sues on behalf of itself, its women members who use or may use the services of women's health centers that perform abortions, and other women who use or may use the services of such centers. The Delaware Women's Health Organization ("DWHO") and the Summit Women's Health Organization, Inc. ("Summit") sue on behalf of themselves and all other similarly-situated clinics performing abortions that defendants seek to drive out of business through a pattern of concerted, unlawful activity.

JURISDICTION

4. This Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331 and 1337. Jurisdiction is additionally

conferred by 15 U.S.C. §§ 15 and 25 and by 18 U.S.C. § 1964. Jurisdiction over the state law claims is conferred by the doctrine of pendent jurisdiction. Plaintiffs' prayers for declaratory relief are authorized by 28 U.S.C. § 2201.

PLAINTIFFS

5. NOW is a nationwide, non-profit organization with over 200,000 members dedicated to advancing and protecting the legal rights of women. Since its founding in 1966, NOW has had a special, on-going concern for the rights of women to reproductive freedom. Currently, NOW is engaged in a wide variety of efforts at the local, state and national levels to ensure that women continue to have access to safe, economical abortion and family planning services. As part of NOW's Campaign for Women's Lives, NOW members escort patients at women's health centers, such as the named plaintiff clinics, DWHO and Summit, as well as at other clinics, including the Ladies Center, Inc. in Pensacola, Florida, to help protect them from harassment and intimidation by defendants and others. NOW is incorporated, and has its principal place of business in Washington, D.C.

6. DWHO is a Florida corporation with its principal place of business in Wilmington, Delaware. DWHO operates a women's health center that provides abortions, counseling to help patients explore alternatives to abortion and a variety of gynecological services such as pelvic examinations, Pap tests, breast cancer screening, birth control counseling, pregnancy testing, and patient education. DWHO was the first out-patient clinic in Delaware of this type. From its inception in 1977 until 1983, it was the only such clinic in Delaware.

7. Summit is a partnership with its principal place of business in Milwaukee, Wisconsin. Summit operates a women's health center that is affiliated with DWHO, which also provides abortion counseling to help patients explore alternatives to abortion and a variety of gynecological services, such as pelvic examinations, Pap tests, breast cancer screening, birth control counseling, pregnancy testing, and patient education.

8. Clinics such as DWHO and Summit provide safe, low-cost abortion services. Approximately three out of four abortions in the United States are performed at clinics such as DWHO and Summit. A first trimester abortion performed at such clinics costs approximately two to five times less than the same procedure at a hospital.

DEFENDANTS

9. Joseph M. Scheidler is a resident of Chicago, Illinois, and has been the director of defendant Pro-Life Action League, Inc. at all times relevant to the lawsuit.

10. John Patrick Ryan is a resident of St. Louis, Missouri, and was the director of defendant Pro-Life Direct Action League, Inc. until September 25, 1987. He has consented to suit in the Northern District of Illinois.

11. Randall A. Terry is a resident of Windsor, New York. He runs a pregnancy testing and counseling center in Binghamton, New York, and is the executive director of Project Life and the national organizer of Operation Rescue. He has engaged in an illegal conspiracy with defendants and others in the Northern District of Illinois, and he has given workshops and speeches, held press

conferences and taken other action in the Northern District of Illinois in furtherance of the illegal conspiracy alleged herein.

12. Andrew Scholberg is a resident of the Northern District of Illinois, and has been the assistant director of defendant Pro-Life Action League, Inc. since February 1988. Before that, he was the director of the Life and Family Center in St. Cloud, Minnesota.

13. Conrad Wojnar is a resident of the Northern District of Illinois. Wojnar runs a number of anti-abortion women's medical clinics in the Chicago area and is the director of the Des Plaines Pro-Life Women's Center.

14. Timothy Murphy is a resident of the Northern District of Illinois. Murphy has been a paid employee of defendant Pro-Life Action League, Inc. since September 1988, and worked as a volunteer for PLAL prior to that date.

15. Monica Migliorino is the director of Citizens for Life in Milwaukee, Wisconsin. She has engaged in an illegal conspiracy with defendants and others in the Northern District of Illinois, and has taken action in this district, described in greater detail below, in furtherance of the illegal conspiracy alleged herein.

16. Vital-Med Laboratories, Inc. ("Vital-Med") is an Illinois corporation with its principal place of business in the Northern District of Illinois. Since 1984, Vital-Med or its predecessor has provided pathology testing and other services to DWHO, Summit and their affiliated clinics. Vital-Med is owned by the Washington National Insurance Company and Dr. Samuel C. Shih, in equal shares.

17. Pro-Life Action League, Inc. ("PLAL") is an Illinois corporation with its principal place of business in Chicago, Illinois. Its business consists of disrupting and closing women's health centers that perform abortions through the use of illegal activity.

18. Pro-Life Direct Action League, Inc. ("PDAL") is a Missouri corporation with its principal place of business in St. Louis, Missouri. Its business consists of disrupting and closing women's health centers that perform abortions through the use of illegal activity. PDAL has consented to suit in the Northern District of Illinois.

19. Operation Rescue ("OR") is an organization comprised of individuals and organizations, including PLAL, PDAL, Scheidler, Ryan, Terry, Scholberg, Murphy, and others. Its principal offices are located in Binghamton, New York. Its business consists of disrupting and closing women's health centers that perform abortions through the use of illegal activity. Through its leader, Randall Terry, and other agents and co-conspirators, OR has engaged in the illegal conspiracy complained of herein with its co-defendants and others in the Northern District of Illinois, and has taken action in furtherance of the illegal conspiracy in this district.

20. Project Life, Inc. (the "Project") is an organization with its principal place of business in Binghamton, New York. Through its officer Randall Terry and other agents and co-conspirators, the Project has engaged in the illegal conspiracy complained of herein with defendants and others in the Northern District of Illinois and has taken action in furtherance of the illegal conspiracy in this district.

CLASS ALLEGATIONS

21. Plaintiffs DWHO and Summit this action on behalf of themselves and all other similarly situated women's health centers in the United States which perform abortions. The prerequisites of Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure are satisfied. The class is so numerous that joinder of all of its members is impracticable; there are numerous questions of law or fact common to the class; the claims of the named plaintiffs are typical of the claims of the class; and the named plaintiffs will fairly and adequately protect the interests of the class. Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief and damages with respect to the class as a whole.

22. Plaintiff NOW brings this action on behalf of itself, its women members who use or may use the services of women's health centers that perform abortions, and all other women who use or may use the services of such health centers. NOW's women members who use or may use the services of women's health centers that perform abortions have standing in their own right, the interests NOW seeks to protect are germane to the organization's purpose, and neither the claim asserted, nor the relief requested, requires the participation of individual NOW members in the lawsuit. Furthermore, there is a close relationship between the interests of NOW and the interests of other women who are not NOW members but who use or may use the services of women's health centers that perform abortions, and the ability of such women to represent themselves is limited. Finally, in the case of both the class of NOW's women members who use or may use the services of women's health centers that perform

abortions and the class of women who are not NOW members but who use or may use the services of such health centers, the class is so numerous that joinder of all of its members is impracticable; there are numerous questions of law or fact common to the class; NOW will fairly and adequately protect the interests of the class; and the defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

INTERSTATE COMMERCE

23. Clinics such as DWHO and Summit are engaged in interstate commerce.

24. A substantial portion of DWHO's patients come from states other than Delaware and a substantial portion of Summit's patients come from states other than Wisconsin.

25. A substantial portion of medical supplies and equipment purchased by DWHO and Summit comes from out-of-state sources.

26. Since at least 1984, defendants have agreed and conspired among themselves and with others to drive every clinic in the United States, such as DWHO and Summit out of business.

27. In pursuit of their goal to drive every clinic out of business, defendants have traveled throughout the country, used inter-state telephone lines and U.S. mail services for the purposes of engaging in, or encouraging others to participate in, unlawful, concerted action, including

repeated acts of trespass, extortion and vandalism directed at women's health centers such as DWHO and Summit.

28. Defendant Scheidler has distributed throughout the United States a manual, *Closed: 99 Ways to Stop Abortion*, outlining methods intended to be used to interfere with and stop women's health centers such as DWHO and Summit from operating. Defendant Scheidler's manual encourages the use of unlawful activities and methods to drive women's health centers such as DWHO and Summit out of business.

29. Defendant Scheidler has traveled throughout the country training other persons to use the methods outlined in *Closed: 99 Ways to Stop Abortion* and encouraging them to drive women's health centers such as DWHO and Summit out of business.

30. Defendants Scheidler, Ryan, Terry, Scholberg, Murphy, and Migliorino have traveled throughout the country leading efforts to shut down women's health centers such as DWHO and Summit and encouraging the use of unlawful methods to do so.

31. Defendants Scheidler, Scholberg and Murphy use defendant PLAL to carry out their unlawful objectives and activities.

32. Defendant Ryan has attempted to disrupt unlawfully the operations of numerous facilities performing abortions throughout the nation, resulting in Ryan's more than 300 arrests.

33. Defendant Ryan has conducted workshops and training sessions throughout the country designed to

encourage other persons to disrupt unlawfully the operations of women's health centers that perform abortions.

34. Defendant Ryan has used defendant PDAL to carry out his unlawful objectives and activities.

35. Defendant Terry has traveled throughout the country encouraging, organizing and training other persons to use unlawful methods to close women's health centers that provide abortion, including blockades of the centers designed to stop ingress and egress.

36. Defendant Terry uses defendants OR and the Project to carry out his unlawful objectives and activities.

37. Defendants Murphy and Migliorino have shipped stolen laboratory specimens in interstate commerce and used interstate telephone and mail communications to help organize actions designed to intimidate and harass clinics by focusing attention on the stolen specimens in at least six states. Defendant Migliorino has also traveled across state lines for the purpose of accomplishing the theft and the local actions. The actions of Murphy, Migliorino, Scheidler, and others have resulted in cancellation of a contract between defendant Vital-Med, the Illinois laboratory from which the specimens were stolen, and DWHO and Summit in Delaware and Wisconsin respectively.

FORMATION OF THE PRO-LIFE ACTION NETWORK

38. On May 10-12, 1984, the first National Pro-Life Conference, entitled "Action for Life," was held in Ft.

Lauderdale, Florida. Defendant Scheidler presented a conference workshop on "Effective Confrontation: A 'How To' of Picketing, Leafletting, Sit-ins and Blitzes." He also spoke at a "Ready for Action" rally. As part of their training, approximately 200 conference participants were taken by bus from the convention to the Women's Awareness Clinic, a clinic that offers abortion services. They surrounded the clinic, blocking all entrances and exits.

39. The following month, in June 1984, defendants Scheidler, Ryan, PLAL, PDAL, and others met in Kansas City, Missouri, to formulate a six-month plan of national activities. The plan included so-called "blitzes" of abortion clinics in which anti-abortionists were to enter the clinics to disrupt their business, to gain media attention and to create a threatening and intimidating atmosphere at the clinics. The plan was designed to close down as many abortion clinics across the country as possible.

40. In April 1985, Action for Life II, the Second Annual Pro-Life Activist Conference was held in Appleton, Wisconsin. At this conference, participants named their coalition of "activist" anti-abortion groups the Pro-Life Action Network ("PLAN"). PLAN adopted an agenda of nationally-coordinated activities, including sit-ins, to shut down the abortion industry and pledged to create "a year of pain and fear" for anyone receiving or performing an abortion. Conference participants were greeted with a marque at the conference site that said "Have a Blast." Many wore firecrackers, to symbolize dynamite, as lapel pins. Defendants Scheidler, Ryan, PLAL, and PDAL participated in this national meeting.

41. On March 25, 1986, defendants Scheidler, Ryan, PLAL, PDAL, and others led a workshop in Pensacola, Florida, designed to encourage local residents to join them in taking unlawful, concerted action to drive women's health centers out of business.

42. On March 26, 1986, the said defendants and others went to the Ladies Center of Pensacola, Inc., a clinic in Pensacola, Florida which performs abortions, to lead an effort to shut it down. During the course of their efforts, four people, including Joan Andrews and John Burt, stormed the clinic. John Burt injured Linda Taggert, the clinic administrator, and Georgia Wilde, then-president of the Escambia County chapter of plaintiff NOW. Andrews ransacked a medical procedures room, destroying surgical supplies. Both Andrews and Burt had to be subdued by the police. Both had their bail revoked after they returned to the clinic following their arrests. Both were convicted on criminal charges as a result of their actions.

43. In April 1986, defendant Scheidler traveled to Delaware to organize and train persons to use his methods for shutting down women's health centers such as DWHO and to galvanize them into action.

44. On April 11, 1986, in furtherance of the nationwide effort to close down women's health centers that perform abortions, defendant Scheidler unlawfully entered DWHO. Scheidler told the then-clinic administrator, Cathy Connor, that he had come to "case the place" because he and his followers intended to force DWHO to close. He stated that he and others intended to make Delaware the first abortion-free state in the nation. He threatened Conner with reprisals should she refuse to quit her job. Conner

subsequently left her job with DWHO in the spring of 1987.

45. On April 12, 1986, defendant Scheidler threatened that anti-abortionists "will get rid of [clinics such as DWHO]. I proclaim that Delaware is going to become the first state in the union to be free of abortion facilities."

46. Defendant Scheidler was arrested and charged with criminal trespass and harassment on April 12, 1986, as a result of his actions at DWHO the previous day. He was subsequently convicted and fined.

47. Later in April 1986, defendants Scheidler, Ryan, PLAL, and PDAL participated as organizers and workshop presenters at PLAN's third annual conference in St. Louis, Missouri, sponsored by defendant PDAL. Conference participants adopted goals for the year which included changing their language to refer to "sit-ins" as "rescue missions." The 1986-1987 PLAN Agenda called for "Days of Rescue" in June, August and December 1986, and January and April 1987. Field training for conference participants in rescue missions took place on Saturday, April 19, when 107 were arrested for blocking access to the Regency Park Center, a clinic in St. Louis that performs abortions.

48. On November 28 and 29, 1986, defendants Scheidler and Ryan returned to Pensacola to demonstrate at the Ladies Center and at the home of Judge William Anderson, who had sentenced Joan Andrews for her role in the invasion of the Ladies Center in March 1986. Defendant Terry also traveled to Pensacola for the demonstrations.

49. On Friday, November 28, several hundred anti-abortionists demonstrated at the Ladies Center for some four hours. Police had to order the demonstrators to let cars through their picket line and onto the Ladies Center property. Seven people were arrested for refusing to move from in front of a truck. After the arrests, the remaining demonstrators moved into the street and stopped traffic. The Escambia County Sheriff's Department had to be called in to help the Pensacola Police Department maintain order.

50. On Saturday, November 29, Scheidler and others addressed a rally followed by a march to the home of Judge Anderson where approximately one hundred protesters gathered. Scheidler went onto the porch of Judge Anderson's home and knocked on the door, but no one answered. Some demonstrators then refused to leave the porch and others left their protest signs behind. When officers began making arrests, Scheidler hurriedly left as the demonstration erupted into a confrontation with police. One officer was knocked to the ground, another was grabbed from behind by demonstrators attempting to aid people who had been arrested in escaping from the police. An officer's radio was taken from him by a demonstrator, and demonstrators surrounded a police cruiser in which one of those arrested had been placed by officers. Once again the city police requested assistance in crowd control from the Escambia County Sheriff's Department when demonstrators refused to move away from the surrounded cruiser. Eight people were arrested.

51. On December 14, 1986, PLAN held a mini-conference in St. Louis, Missouri, attended by defendants Ryan and Scholberg, among others. Defendant Scheidler sent a tape and received a copy of Scholberg's notes from the meeting, including the goals and guidelines

adopted. The mini-conference was held in large part to discuss their concerns over public perception of the incidents November 28 and 29 in Pensacola. Scholberg and Ryan reported to the group that Scheidler might want to distance himself from PLAN for a while.

52. The participants agreed unanimously that one of their goals was to close down abortion clinics. They set out guidelines to ensure better control of PLAN demonstrations in order to improve public perception of the activist anti-abortion movement, improve media relations and promote an impression of unity in their movement. Ryan was named interim leader of PLAN, and it was agreed that some kind of leadership council, including Ryan and Scheidler, should be on the agenda at the next PLAN Convention April 29 to May 2, 1987. The PLAN leaders agreed to meet again on January 21, 1987, in Washington, D.C.

53. From April 30 to May 2, 1987, all of the defendants except Wojnar, Migliorino and Vital-Med took part in the annual PLAN convention in Atlanta, Georgia, including field training on Saturday, May 2, 1987. Defendants Scheidler, Ryan, Terry and Scholberg were featured as speakers at the convention. Defendant Murphy attended. Seventy-nine people, including defendant Ryan, were arrested during the field training at the Women's Health Center. A news release from defendants before the Conference stated that they would try to stop abortions at Atlanta clinics "by any and all means available. No abortion clinic will be spared." At a news conference on Friday of the convention, defendant Scheidler said tactics such as blocking entrances of clinics and abrasive confrontations with women seeking abortions were

necessary "to take their business away from [the providers]."

54. At the 1987 PLAN convention, a leadership council of five regional representatives was elected, including defendants Scheidler, Ryan, Terry along with Andrew Burnett from Portland, Oregon, and Peter Lennox from Atlanta, Georgia. Burnett had been arrested at the 1986 PLAN convention field training; Lennox had attended the PLAN mini-conference in December 1986; and both Burnett and Lennox were featured speakers at the 1987 PLAN convention. The council met during the convention and met again on August 21, 1987, in Washington, D.C.

55. From August 25 through 27, 1988, defendant PLAL sponsored the 1988 PLAN convention in Chicago, Illinois. Defendants Scheidler, Scholberg, Murphy, Migliorino, Terry, PLAL, OR, and the Project took part. Scholberg, Murphy and Migliorino were speakers. Defendant Terry also spoke to the convention on the activities of OR and was featured at a PLAN news conference on Friday, August 26, encouraging others to take part in planned field training the next day. On Saturday, August 27, conference participants, including defendants Scheidler, Murphy and others, took part in demonstrations at two clinics in Chicago. At one of the clinics, demonstrators used a tactic which defendant Scheidler called a "lock and block." Scheidler described it as a new method requiring fewer people to close a clinic. Demonstrators poured glue into the locks of the clinic's doors and locked a Kryptonite bicycle lock on the door handles. Defendant Murphy and another demonstrator also used bicycle locks, positioned around Murphy's neck and the other demonstrator's ankle, to attach themselves to a solid block of concrete which they had placed in front of

the clinic door. Sixteen people, including defendant Murphy, were arrested in connection with the blockade of the clinic.

CARRYING OUT PLAN'S AGENDA: OPERATION RESCUE

56. Beginning no later than 1986, the PLAN Defendants and others in PLAN conspired to organize massive sit-ins and clinic invasions at abortion clinics nationwide. Their goal was to block access to the clinics in order to prevent patients and staff from entering or exiting and to create a threatening, intimidating atmosphere and a public image of danger in connection with the clinics. Defendant Terry presented the proposal to the other defendants in November 1986, in Pensacola, Florida.

57. Over a period of months, the plan to blockade clinics, organized under the name Operation Rescue, was discussed and revised. Following a visit between defendants Scheidler and Terry in New York in March 1987, the plan was finalized and brochures were printed showing defendants Scheidler, Ryan, Scholberg, PLAL, and PDAL among the co-sponsors of OR.

58. The revised plan for OR was presented at the 1987 PLAN convention. The 1987-88 direct action schedule which came out of the convention included OR actions from April 30 through May 7, 1988, directed at clinics in the New York City area. Field training was scheduled for Thanksgiving 1987, in St. Louis, but at the PLAN leadership council meeting August 21, 1987, in Washington, D.C., defendants and the other organizers

decided to change the location to the northeastern United States.

59. On November 28, 1987, PLAN organizers and others affiliated with them took part in an OR field training in Cherry Hill, New Jersey. Some 300 people from over a dozen states blocked access to the Cherry Hill Women's Center. Two hundred eleven were arrested.

60. From May 2 through May 6, 1988, in violation of both state and federal restraining orders, OR conducted four days of clinic blockades in New York City and Hicksville, Long Island. Arrests totalled 503 on Monday, May 2; 423 on Tuesday, May 3; 401 on Thursday, May 5; and 320 on Friday, May 6. Defendant Scheidler served as an official marshal during OR in New York. Defendants Scheidler and Scholberg were among those arrested. Scheidler was reported to have said he was there to see how the New York action was done, since they expected to do an OR action in Chicago as well.

61. On July 19, 1988, a series of OR actions began in Atlanta, Georgia. More than 1,200 participants were arrested during the nearly four months that the actions continued. Felony charges were brought against defendant Terry for inciting police assault and clinic trespass. At least 30 OR participants in Atlanta were arrested on felony charges: 8 for assaulting a police officer; 6 for terrorist acts; and 16 for false imprisonment.

62. In early October 1988, PLAN ended the OR actions in Atlanta as it geared up for a National Day of Rescue on October 29, 1988. For the National Day of Rescue, defendants Terry, Scheidler, Scholberg, Murphy, PLAL, PDAL, and other PLAN participants organized

simultaneous OR actions in some 40 cities around this country and in Toronto, Canada, blockading clinics and prompting nearly 2,500 arrests.

63. In addition to the foregoing nationally-coordinated OR actions, local OR actions have taken place continuously since the November 1987, field training in Cherry Hill, New Jersey. More than 9,700 participants have been arrested in OR actions since that time.

THEFT OF FETAL REMAINS

64. Beginning sometime before January 1988, defendants Scheidler, Scholberg, Murphy, Migliorino, Wojnar, PLAL, and others, including one or more employees of Vital-Med, conspired to steal fetal remains located in Vital-Med's research laboratory in Northbrook, Illinois. DWHO, Summit and other clinics had sent the specimens to Vital-Med for pathology testing. Defendants conspired to use the specimens as part of their drive to disrupt the operations of health clinics generally, and the operations of clinics affiliated with plaintiffs DWHO and Summit specifically, by keeping women away from the clinics through threats and intimidation and by interfering with the clinics' relations with the laboratory, lessors and others.

65. For more than six years, Vital-Med had provided services to DWHO, Summit and their affiliated clinics. Pursuant to their contract, Vital-Med performed gross and microscopic pathology testing on the fetal specimens and provided sanitary disposal of the remains.

66. In approximately January 1988, defendant Wojnar received a call from a Vital-Med employee. The employee discussed with Wojnar how fetal remains could be stolen from the laboratory. Following this call, Wojnar discussed the matter with Murphy and, over a period of approximately ten months, continuing until approximately November 1988, Murphy, Migliorino and others, with the complicity of one or more employees of Vital-Med, stole some 4,000 specimens from the laboratory.

67. Murphy and Migliorino each made several trips to Vital-Med and coordinated the actions of others who went with them. They went onto Vital-Med's property and entered the laboratory building, either through a garage door or, on Sundays when that door was closed, through a side door which was left ajar. Then they would proceed to the loading dock, open sealed storage containers and remove fetal specimens from among other medical waste, and take them from the premises. On at least one occasion, an entire storage drum was stolen, using a hand cart. On one or more occasions, Vital-Med employees saw Murphy and Migliorino but did nothing to stop the thefts.

68. The fetal remains were stored initially at various co-conspirators' homes, including the homes of defendants Scheidler, Murphy, Migliorino, and Wojnar. The stolen storage drum was taken by Murphy to Scheidler's home, where it was stored for several weeks in a playhouse in Scheidler's backyard. Eventually a public storage facility was rented and the drum was moved there. Ultimately, after removing the fetal remains from the drum, Murphy deposited the drum with the remainder of the medical waste in an ordinary garbage dumpster in the Chicago area.

69. In the summer of 1988, Murphy, Migliorino and others sent some of the fetal remains to co-conspirators Frank Avila in Fort Wayne, Indiana; Lucy M. O'Keefe in Chapel Hill, North Carolina; Charlene Crommett in Fargo, North Dakota; Dee Becker, chairwoman of the Delaware Pro-Life Coalition in Wilmington, Delaware, and anti-abortionists in Tallahassee, Florida. Many of the shipments were made by United Parcel Service with the return address of PLAL. Others were shipped by private automobile.

70. In North Carolina, 157 fetuses were shipped by a network of anti-abortionists to O'Keefe, who kept them in her kitchen. O'Keefe made arrangements for a highly-publicized funeral mass and burial on August 23, 1988. In news stories about the incident, defendant Scheidler was widely quoted as stating that the fetuses had been found at a lab in Chicago and that they were "individually packaged and labelled...with the names of the mothers, doctors, dates and places the abortions were performed."

71. In Milwaukee, Wisconsin, Migliorino arranged a September 10, 1988, ceremony and burial for a reported 1,200 fetuses. Migliorino's group and nine others issued a news release before the events, stating that they intended to release the names of the Milwaukee clinics from which the fetal remains had been taken. Defendant Scheidler again confirmed publicly that the fetuses came from Vital-Med. In published news reports, Migliorino stated that 700 of the fetuses came from Summit and another Milwaukee clinic.

72. Migliorino shipped approximately 150 fetuses from Milwaukee to Fargo, North Dakota, for burial ceremonies arranged by Crommett. In a press account, Migliorino stated that the fetuses came from the Fargo Women's Health Organization, an affiliate of DWHO and Summit,

and had been shipped originally by the Fargo clinic to a suburban area of Chicago where anti-abortionists obtained them.

73. In Chicago, Fort Wayne, Wilmington, and Tallahassee, similar actions took place. Fetal remains stolen from the lab in Northbrook were sent from the Chicago area, given local burial amidst a media campaign designed to generate negative publicity for women's health clinics generally and for affiliates of DWHO and Summit, specifically.

74. The public statements of defendant Scheidler and the local co-conspirators implied that the clinics were not following proper procedures in disposing of medical waste. They carried the clear threat to suppliers, landlords, doctors and others who provide goods and services to the clinics, that they too could be targeted by defendants for theft and other illegal activity as well as harassment and public controversy.

75. The actions of defendants and their co-conspirators also presented an obvious threat to women who have used, or might in the future consider using the clinics, that their privacy would be invaded and the confidentiality of their treatment breached by having their names and personal, medical information revealed publicly.

76. Vital-Med has now informed the management company for DWHO, Summit and their affiliates that effective January 1, 1989, it would no longer accept fetal specimens from the clinics for analysis. Plaintiffs DWHO and Summit are informed that Vital-Med had been forced by a company referred to as "Washington National" to terminate this relationship with the clinics. On information

and belief, the company to which Vital-Med referred is Washington National Insurance Corporation, or one of its operating subsidiaries, which owns a 50% interest in Vital-Med, and whose counsel, Craig Edwards, and board member, Edward Cottrell, serve as Secretary and board member, respectively, of Vital-Med.

77. At approximately the same time that she was working on the plan to steal and then publicize the stolen fetal remains, Migliorino also was engaged in a campaign to force the new lessor of Summit to breach its lease with the clinic. Following techniques outlined in defendant Scheidler's book, Migliorino sent letters directly to the landlord and to other tenants, threatening disruption and harassment if Summit were allowed to move in to the building.

78. Summit's landlord, Jefferson Associates, Ltd., has notified the clinic that it will breach their lease and refuse to let the clinic move into the new premises. The landlord, through Joel S. Lee, the President of its General Partner, Van Buren Management, Inc., has also advised Summit that it was forced by "Washington National" to terminate the lease with the clinic. On information and belief, the Washington National to which the landlord referred is Washington National Development Corporation, or one of the operating subsidiaries of Washington National Insurance Company, which holds a mortgage on the premises which were subject to the Summit lease. Washington National's in-house counsel, Craig Edwards, has confirmed to plaintiffs' counsel that he spoke with Joel Lee about the lease, but has stated that he told Lee that Washington National would not withhold its approval of the lease. Summit's current lease has expired. Summit is continuing

as a month-to-month tenant at its present location. Summit does not have a new location into which to move.

COUNT I: SHERMAN ANTITRUST ACT

79. Count I is brought against defendants Scheidler, Ryan, Terry, Scholberg, Murphy, Wojnar, Migliorino, PLAL, PDAL, OR, the Project (the "PLAN Defendants"), and Vital-Med.

80. Plaintiffs restate the allegations set forth in paragraphs 1 through 78.

81. The agreement among and the activities of the PLAN Defendants and Vital-Med are designed to, and threaten to, restrain interstate trade.

82. The agreement among and the activities of the PLAN Defendants and Vital-Med have, and threaten to have, an anti-competitive effect.

83. Women's health centers throughout the United States, including DWHO and Summit, have been damaged, and are threatened with damage by reason of the actions of the PLAN Defendants and Vital-Med.

84. Women, including NOW members, who seek abortions and other services offered by women's health centers have been damaged, and are threatened with damage, by reason of the PLAN Defendants' and Vital-Med's actions.

85. The purpose of the PLAN Defendants' and Vital-Med's actions is to force all clinics that perform

abortions out of business and to eliminate the choice of abortion for women who are pregnant.

86. The PLAN Defendants' and Vital-Med's actions have forced, and threaten to force, women's health centers that perform abortions out of business.

87. The PLAN Defendants' and Vital-Med's actions have increased the cost, and threaten to increase the cost, of having an abortion by compelling women's health clinics to incur, and to raise their charges to cover, the expense of increased security, higher insurance premiums, higher rents, and mounting legal fees, among other things.

88. The PLAN Defendants' and Vital-Med's actions have made it, and threaten to make it, more difficult for women to obtain abortions, birth control, fertility treatment, pregnancy testing, counseling, and other gynecological services.

89. Women's health centers whose cost increase are less able to compete with other facilities offering the same or similar services.

90. The PLAN Defendants' and Vital-Med's actions have been designed to interfere with, and threaten to interfere with, the on-going business and contractual relationships women's health centers have with patients, laboratories, lessors, doctors, employees, and others.

91. The PLAN Defendants' and Vital-Med's actions have increased, and threaten to increase, the risk of medical complications faced by women who seek abortions by forcing such women to postpone abortions or by exposing such women to a pattern of harassing and intimidating

conduct designed to create stress and to stop them forcibly from exercising their choice to have an abortion.

92. NOW has been frustrated, and is threatened with being frustrated, by the defendants' actions in its efforts to ensure that women continue to have access to safe, economical abortions and family planning services. NOW has had to devote significant resources to identify and counteract the defendants' actions.

93. The PLAN Defendants' and Vital-Med's actions violate the rights of NOW, DWHO, Summit, all similarly-situated women's health centers, and their current and prospective patients, to be free of restraints and threatened restraints of trade under Section One of the Sherman Antitrust Act, 15 U.S.C. § 1.

WHEREFORE, plaintiffs pray that this Court:

(1) Certify this case as a plaintiffs' class action;

(2) Declare that the actions of PLAN Defendants and Vital-Med have violated the rights of NOW, DWHO, Summit, all similarly-situated women's health centers, and their current and prospective patients, to be free of restraints of trade under Section One of the Sherman Antitrust Act, 15 U.S.C. § 1;

(3) Enjoin the PLAN Defendants and Vital-Med from carrying out a concerted effort to drive women's health centers such as DWHO and Summit out of business;

(4) Enjoin the PLAN Defendants and Vital-Med from using unlawful means to drive women's health centers such as DWHO and Summit out of business;

(5) Award DWHO, Summit and all similarly situated women's health centers treble damages from the PLAN Defendants and Vital-Med;

(6) Grant plaintiffs their costs in this action and reasonable attorneys' fees; and

(7) Grant such other and further relief as the Court deems just and proper.

COUNT II: RICO § 1962(a)

94. Count II is brought against the defendants Scheidler, Terry, Scholberg, Murphy, PLAL, OR, and the Project (the "RICO Defendants") by plaintiffs DWHO and Summit and the class they represent, which reallege paragraphs 1 through 78.

95. PLAN is an enterprise under 18 U.S.C. § 1961(4), engaged in and affecting interstate commerce. PLAN is an association of individuals and groups with common purposes, including driving all clinics that provide abortion services out of business and preventing the plaintiff clinics from conducting business. PLAN is wholly distinct from the pattern of racketeering activity engaged in by each defendant.

96. The PLAL, OR and the Project are each enterprises under 18 U.S.C. § 1961(4), engaged in and affecting interstate commerce. The common purpose of each association is to drive clinics that provide abortion services out of business. PLAL, OR and Project Life are distinct from the pattern of racketeering activity engaged in by each defendant.

97. Defendants Scheidler, Scholberg, Murphy, Wojnar, PLAL, Terry, OR, and the Project, each a person under 18 U.S.C. § 1961(3), receive income, directly or indirectly, from a pattern of racketeering activity that includes predicate offenses in violation of 18 U.S.C. § 1951 (the "Hobbs Act"). Defendants conspired to, attempted to or did wrongfully use threatened or actual force, violence or fear to induce or attempt to induce the employees of affected clinics to give up their jobs; doctors involved with affected clinics to give up their economic right to practice medicine at the plaintiff clinics; patients of affected clinics to give up their right to obtain services at the plaintiff clinics; and prospective patients of clinics to give up their constitutional right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force.

98. Specifically, the RICO Defendants have committed the following predicate acts among others:

a. Attempts, conspiracies to commit and commission of extortion against the Women's Awareness Clinic, its employees, doctors, patients, and prospective patients in Ft. Lauderdale, Florida, by persons attending the 1984 National Pro-Life Conference, at which defendant Scheidler presented a workshop;

b. Conspiracy to commit extortion by defendant Scheidler and others associated with him as part of their participation in the 1985 PLAN Conference against anyone receiving or performing an abortion;

c. Conspiracy to commit extortion by persons attending a March 25, 1986, workshop led by

defendants Scheidler and others associated with defendants in Pensacola, Florida, which organized persons to attempt or commit extortion to drive the Ladies Center and similar women's health centers out of business;

d. Attempted extortion and the commission of physical violence against persons on March 26, 1986, when John Burt physically injured the president of the local NOW chapter and others in the course of efforts by defendants Scheidler, PLAL and others associated with them to shut down the Ladies Center by committing extortion. John Burt wrongfully threatened and used actual force to induce the employees of affected clinics to give up their jobs; doctors involved with affected clinics to give up their economic right to practice medicine at the plaintiff clinics; patients of affected clinics to give up their right to obtain services at the plaintiff clinics; and prospective patients of affected clinics to give up their constitutional right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force;

e. The destruction of medical supplies by Joan Andrews on March 26, 1986, in the course of efforts by defendants Scheidler, PLAL and others associated with them to shut down the Ladies Center and in furtherance of a plan to commit extortion by using threatened or actual force or fear to induce the Ladies Center's employees, doctors, patients, and prospective patients to relinquish their economic rights and property interests;

f. Attempts, conspiracies to commit and commission of extortion against the Regency Park

Center, its employees, doctors, patients, and prospective patients in St. Louis, Missouri, by persons attending the 1986 PLAN Conference, in which defendants participated as organizers and workshop presenters;

g. Attempted extortion by defendant Scheidler on April 11, 1986, when Scheidler threatened DWHO's clinic administrator with reprisals if she refused to quit her job at the clinic in order to induce the clinic administrator to quit that job;

h. Attempts, conspiracies to commit and commission of extortion against the Women's Health Center, its employees, doctors, patients, and prospective patients in Atlanta, Georgia, by persons attending the 1987 PLAN Conference, in which defendants took part;

i. Attempts, conspiracies to commit and commission of extortion at a series of OR actions, including:

(1) A "field training" action on November 28, 1987, and continuous actions since then directed at the Cherry Hill Women's Center in Cherry Hill, New Jersey, in which Terry, OR, the Project, and others associated with them have blocked access to the clinic, among other actions;

(2) Four days of blocking the entry to clinics in New York City and Hicksville, Long Island, from May 2 to May 6, 1988. Terry was an organizer and Scheidler served as official marshal for the New York action. Terry, Scheidler and other PLAL

employees were among those arrested at the New York actions;

(3) Nearly four months of actions, beginning July 19, 1988, directed against clinics in Atlanta, Georgia. More than 1,200 participants in these actions, including Terry and others associated with him, were arrested for charges including inciting police assault, assaulting a police officer, terrorist acts, false imprisonment, and trespass;

(4) A 40-city National Day of Rescue on October 29, 1988, organized by defendants Terry, Scheidler, PLAL, OR, the Project, and others associated with them to block access to clinics to force and attempt to force clinics to close;

j. Attempts, conspiracies to commit and commission of extortion in 1988 by defendants Scheidler, Murphy, Migliorino, Wojnar, PLAL, and others associated with them against patients and prospective patients of clinics affiliated with plaintiffs DWHO and Summit. Specifically, (1) Scheidler, Wojnar, Murphy, Migliorino, PLAL, and others associated with them conspired to steal and hide the fetuses; and (2) Scheidler, Murphy, Migliorino, PLAL, and others (a) threatened to disclose confidential information about previous patients of these clinics, in connection with the theft of fetal remains from Vital-Med, and (b) publicized and conducted funeral masses and burials for the stolen fetuses. The said defendants committed the above acts in order to induce fear in prospective patients and thus force them to forego the right to decide where to seek medical services free from pressure by defendants and others;

k. Attempts and conspiracies to commit extortion by Scheidler, Murphy, Migliorino, Wojnar, PLAL, and others associated with them against doctors working with clinics affiliated with plaintiffs DWHO and Summit. Specifically, the said defendants and others affiliated with them (1) threatened to disclose, and in some cases did disclose, the identity of these doctors in connection with the theft of fetal remains from Vital-Med; and (2) conducted and publicized fetal funerals. The said defendants committed the above acts in order to induce fear in the doctors to force them to forego the economic benefits of their involvement with the clinics; and

l. Attempts and conspiracies to commit extortion by Scheidler, Murphy, Migliorino, Wojnar, PLAL, and others associated with them against clinics affiliated with plaintiffs DWHO and Summit. Specifically, the said defendants and others (1) illegally stole, hid and transported fetal specimens from Vital-Med in Northbrook, Illinois, to Fargo, North Dakota, Ft. Wayne, Indiana, Raleigh, North Carolina, Wilmington, Delaware, and Milwaukee, Wisconsin; (2) threatened to disclose confidential information about patients and the identities of doctors in connection with the theft of fetal remains from Vital-Med; (3) publicized and conducted funeral masses and burials for the stolen fetuses. The said defendants and others affiliated with them committed the above acts to induce the clinics to fear the economic losses that would result both from the invasion of privacy of clinic patients and doctors and from negative publicity associated with the fetal funerals. Thus, Scheidler, PLAL and the others attempted and conspired to force the clinics to stop providing abortion services.

99. Each of the attempts and conspiracies to commit extortion obstructed, delayed, and/or affected interstate commerce insofar as it succeeded. Each of the successful conspiracies to commit or commissions of extortion, and the physical violence committed by John Burt and Joan Andrews in furtherance of plans to commit extortion, obstructed, delayed and/or affected interstate commerce.

100. The income the PLAN Defendants receive from their pattern of racketeering activity includes contributions received by these defendants in support of their extortionate acts. Defendants Scheidler, Scholberg, Murphy, and Terry also receive or have received salaries or other payments and benefits, including, in the cases of Scheidler, Scholberg and Murphy, the personal use of a car owned by PLAL, because of their involvement in the pattern of racketeering activity.

101. Defendants Scheidler, Scholberg, Murphy, and PLAL used or invested, directly or indirectly, income received from a pattern of racketeering activity, or the proceeds from that income, to establish or operate PLAN and PLAL.

102. Defendants Ryan and the PDAL used or invested, directly or indirectly, income received from a pattern of racketeering activity, or the proceeds from that income, to operate PLAN and PDAL.

103. Defendants Terry, OR and the Project used or invested, directly or indirectly, income received from a pattern of racketeering activity, or the proceeds from that income to operate PLAN, OR and the Project.

104. Each defendant's violation of 18 U.S.C. § 1962(a) has injured the business and/or property interests of the plaintiffs and the class members. The RICO Defendants' investment of income received from the pattern of racketeering activity or the proceeds therefrom has injured plaintiffs by furthering those illegal goals of PLAN, and/or PLAL, OR or the Project which involve extortionate and anti-competitive activities against abortion providers.

105. Specifically, the RICO Defendants' activities have decreased the business of, and/or increased the cost of doing business at, DWHO, Summit and similarly-situated clinics. The RICO Defendants' activities have injured the plaintiff class of female NOW members and other women who have been unable to obtain abortion services, or whose choice of clinics that provide these services has been restricted, by depriving them of the right to choose freely between abortion providers in an unthreatened marketplace and to reap the economic and medical advantages of having that choice.

WHEREFORE, plaintiffs ask that this Court certify this case as a plaintiffs' class action; award plaintiffs DWHO and Summit treble damages, to be proved at trial, along with costs, attorneys' fees, and grant all other relief to which plaintiffs may be entitled.

COUNT III: RICO § 1962(c)

106. Count III is brought against the RICO Defendants and defendant Migliorino by plaintiffs DWHO and Summit and the class of clinics they represent, which reallege paragraphs 1 through 79, and 96 through 105.

107. Defendants Scheidler, Terry, Scholberg, Murphy, and Migliorino, each persons under 18 U.S.C. § 1961(3), are associated with PLAN by virtue of their involvement in its annual conventions as speakers and in other capacities. Defendants Scheidler and Terry are also associated with PLAN by virtue of their positions on its leadership council.

108. Defendants PLAL, OR and the Project, each a person under 18 U.S.C. § 1961(3), are associated with PLAN and are constituent groups that comprise PLAN. In addition, they are associated with PLAN through the roles of their respective current or former directors, Scheidler and Terry, in PLAN.

109. Each RICO Defendant and Migliorino conducted and participated in PLAN's affairs through a pattern of racketeering activity. The predicate acts comprising the pattern of racketeering activities include those acts described in paragraph 99 above. As a consequence of the pattern of racketeering activity, defendants Scheidler, Terry, Scholberg, Murphy, Wojnar, and Migliorino, and through them, PLAL, OR and the Project have obtained and maintained significant roles in PLAN.

110. As a result of each defendant's violation of 18 U.S.C. § 1968(c), plaintiffs have suffered the injuries described *supra* in paragraphs 104-105.

WHEREFORE, plaintiffs ask that this Court certify this case as a plaintiffs' class action, award plaintiffs DWHO and Summit treble damages, to be proved at trial, along with costs and attorneys' fees, and grant all other relief to which plaintiffs may be entitled.

COUNT IV: RICO § 1962(d)

111. Count IV is brought against the RICO Defendants by plaintiffs DWHO and Summit and the class of clinics which they represent, which reallege paragraphs 1 through 78, 95 through 105 and 107 through 110 above.

112. Defendants Scheidler, Scholberg, Murphy, and Terry conspired with each other and other persons to use the income they received from a pattern of racketeering activity, or the proceeds therefrom, to establish or operate PLAN, in violation of 18 U.S.C. § 1962(d). Each of these defendants further agreed to the commission of the extortionate acts from which the above-mentioned income would derive.

113. Defendants Scheidler, Scholberg, Murphy, Migliorino, Terry, and, on information and belief, Wojnar agreed with each other and other persons to conduct and/or participate in the affairs of PLAN. Each of these defendants further agreed to the commission of extortionate acts through which each defendant would conduct and/or participate in PLAN's affairs in violation of 18 U.S.C. § 1962(d).

114. As a direct result of defendants' conspiracy in violation of 18 U.S.C. § 1962(d), plaintiffs have been injured in their business and/or property, as alleged in paragraphs 104-105 above.

WHEREFORE, plaintiffs ask that the Court certify this case as a plaintiffs' class action, award plaintiffs DWHO and Summit treble damages, to be proved at trial, along with other costs, attorneys' fees, and grant all other relief to which plaintiffs may be entitled.

COUNT V: TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

115. Count V is brought against defendants Scheidler, Scholberg, Murphy, Migliorino, Wojnar, and PLAL by DWHO and Summit, on their own behalf and not on behalf of any class. Plaintiffs reallege paragraphs 1 through 78.

116. DWHO, Summit, the Fargo Women's Health Organization, Inc., the Fort Wayne Women's Health Organization, Inc., and the Raleigh Women's Health Organization, Inc. are among nine affiliated clinics (the "WHO Clinics"). The WHO clinics, through their management company, National Women's Health Organization, Inc., had a contract with Vital-Med to provide abortion-related and other pathology services to the clinics. Vital-Med provided services to Summit since 1982 and has had a contractual relationship since 1984. As recently as August 27, 1988, Vital-Med and the WHO clinics had agreed on a fee schedule which would govern their contractual relationship in the future.

117. Before defendants engaged in the unlawful acts described above, DWHO and Summit had an expectancy of a valid business relationship with Vital-Med. On information and belief, each defendant was aware of that expectancy.

118. During 1988, defendants schemed to steal and send fetal specimens from Chicago to Fargo, Ft. Wayne, Raleigh, Milwaukee, and Wilmington. Defendants or their followers, who knew of Vital-Med's contract with the WHO clinics, agreed with one or more Vital-Med employees that the employee(s) assist the defendants in stealing the specimens. After stealing the fetal remains, the

defendants shipped them to a variety of locations across the country, and told the press that the specimens were being taken "home" to be buried. Based on information provided by the defendants, newspapers named Vital-Med as the source of the specimens.

119. In the week of November 7, 1988, Vital-Med terminated its contract to provide abortion-related pathology services to the WHO clinics. Vital-Med simultaneously wrote to the National Women's Health Organization, Inc. that it enjoyed their working relationship and would continue to provide the clinics with services related to processing PAP smears.

120. Upon information and belief, each defendant intentionally, maliciously and without justification induced Vital-Med to terminate its business with the WHO clinics. Defendants' theft of the specimens was an illegal and improper act designed to induce Vital-Med's termination of its relationship with the WHO clinics.

121. Each defendant's interference with the plaintiff clinics' prospective economic advantage is improper and unjustified. Defendants have committed illegal acts in order to interfere with the plaintiff clinics' business expectancies.

122. As a result of defendants' tortious interference with the ongoing business relationship between the WHO clinics and Vital-Med, the WHO clinics have incurred and will incur damages in obtaining new sources for laboratory testing and medical waste disposal services.

WHEREFORE, plaintiffs ask that this Court award DWHO and Summit compensatory and punitive damages for defendants' tortious interference with their contracts

with Vital-Med, costs, and all other relief to which they are entitled.

COUNT VI: TORTIOUS INTERFERENCE WITH EXISTING BUSINESS RELATIONSHIP

123. Count VI is brought against defendant Migliorino by Summit, on its own behalf, and not on behalf of any class. Summit realleges paragraphs 1 through 78.

124. On July 26, 1988, Summit entered into a lease with Jefferson Associates, Ltd. for space in the Jefferson Building to be used as a clinic in Milwaukee, Wisconsin.

125. Defendant Migliorino, who knew of Summit's lease of space in the Jefferson Building, sent a letter, dated October 4, 1988 to other tenants in the Jefferson Building and businesses located in the area surrounding the building. This letter threatened controversy and conflicts with anti-abortion activists if Summit were allowed to enjoy the benefits of its lease. Specifically, Migliorino threatened weekly pickets and demonstrations, including sit-ins in the building lobby, chaining building doors closed and blocking doors with cars. She threatened that female business clients of other businesses would be suspected of going to the clinic and would be harassed by so-called sidewalk counselors. She also made reference to the press coverage of the stolen fetal remains and the fetal funeral in Milwaukee to demonstrate the lengths to which she and her associates would go to prevent Summit from operating its business.

126. Migliorino asked the other tenants and businesses to send letters of opposition to Joel S. Lee, President of

Van Buren Management, Inc., the general partner of Jefferson Associates, Ltd. She stated that "Joel S. Lee, however, welcomes your protest on this matter and if tenants are opposed, the mortgage lender *will not* approve the lease." (Emphasis in original.) Upon information and belief, the lender was Washington National Development Corporation, a subsidiary of Washington National Insurance Company.

127. Jefferson Associates, Ltd. has now informed Summit that Summit will not be allowed to move into the Jefferson Building pursuant to the lease. Defendant Migliorino has taken credit publicly for causing the landlord to breach the lease.

128. Migliorino intentionally and without justification induced Jefferson Associates, Ltd. to breach its contract with Summit. Her actions were an illegal and improper inducement of Jefferson Associates, Ltd.'s cancellation of the lease.

129. As a result of defendant's tortious conduct and Jefferson Associates, Ltd.'s resulting breach of contract, Summit has incurred and will incur damages in obtaining a lease for other premises.

WHEREFORE, plaintiffs ask that this Court award Summit damages for defendant's tortious interference with its contract with Jefferson Associates, Ltd., punitive damages, costs, and all other relief to which they are entitled.

COUNT VII:
BREACH OF DUTY OF CONFIDENTIALITY

130. Count VII is brought against Vital-Med by DWHO and Summit, which reallege paragraphs 1 through 78.

131. Vital-Med knew that a doctor-patient relationship existed with regard to the fetal specimens sent by the plaintiff clinics to Vital-Med for testing and disposal, and that confidentiality was owed by the clinics and the doctors to the women who had abortions. Vital-Med had a duty of confidentiality to the plaintiff clinics and the women whose fetal specimens were sent for pathology testing and disposal. Nevertheless, Vital-Med failed to establish and follow any security procedures to provide confidentiality regarding the names of the clinics, the doctors and the women who had abortions at DWHO, Summit and their affiliated clinics and to ensure proper sanitary disposal of the remains.

132. As a result of Vital-Med's tortious conduct, DWHO and Summit have incurred and will incur damages.

WHEREFORE, plaintiffs ask that this Count award DWHO and Summit damages, costs and all other relief to which they are entitled.

Respectfully submitted,

Fay Clayton, Esq.
ROBINSON CURLEY &
CLAYTON, P.C.
200 West Adams Street
Suite 2701
Chicago, Illinois 60606

Alan Pollack, Esq.
POLLACK & GREENE
950 Third Avenue
New York, New York
10022

Patricia Ireland, Esq.
Kim Gandy, Esq.
NATIONAL ORGANIZATION
FOR WOMEN, INC.
1000 16th Street, N.W.
Suite 700
Washington, D.C. 20036-5705

Judi Lamble, Esq.
SACHNOFF &
WEAVER, LTD.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606

ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,	)	
Plaintiffs,	)	**No. 86 C 7888**
v.	)	
JOSEPH M. SCHEIDLER, et al.,	)	
Defendants.	)	

ORDER

JAMES F. HOLDERMAN, District Judge:

This case contains three civil Racketeer Influenced and Corrupt Organization Act ("RICO") claims, which have been filed in this court pursuant to 18 U.S.C. §§ 1961-1968. This RICO Case Statement Order has been designed to establish a uniform and efficient procedure for processing these claims.

The plaintiffs shall file by February 25, 1991, a RICO case statement. This statement shall include the facts the plaintiffs are relying upon to initiate each RICO claim as a result of the "reasonable inquiry" required by Fed. R. Civ.

P. 11. In particular, this statement shall be in a form which uses the numbers and letters as set forth below, and shall state in detail and with specificity the following information.

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§ 1962(a), (b), (c), and/or (d).

2. List each defendant and state the alleged misconduct and basis of liability of each defendant.

3. List the alleged wrongdoers, other than the defendants listed above, and stated the alleged misconduct of each wrongdoer.

4. List the alleged victims and state how each victim was allegedly injured.

5. Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. A description of the pattern of racketeering shall include the following information:

a. List the alleged predicate acts and the specific statutes which were alleged violated;

b. Provide the dates of the predicate acts, the participants in the predicate acts, and a description of the facts surrounding the predicate acts;

c. If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the "circumstances constituting fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated in particularity." Fed. R. Civ. P.

9(b). Identify the time, place and contents of the alleged misrepresentations, and the identity of the persons to whom and by whom the alleged misrepresentations were made;

d. State whether there has been a criminal conviction for violation of the predicate acts;

e. State whether civil litigation has resulted in a judgment in regard to the predicate acts;

f. Describe how the predicate acts form a "pattern of racketeering activity"; and

g. State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe in detail.

6. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:

a. State the names of the individuals, partnerships, corporations, associations, or other legal entities, which allegedly constitute the enterprise;

b. Describe the structure, purpose, function and course of conduct of the enterprise;

c. State whether any defendants are employees, officers or directors of the alleged enterprise;

d. State whether any defendants are associated with the alleged enterprise;

e. State whether you are alleging that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself, or members of the enterprise; and

f. If any defendants are alleged to be the enterprise itself, or members of the enterprise, explain whether such defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

7. State and describe in detail whether you are alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

11. If the complaint alleges a violation of 18 U.S.C. § 1962(a), provide the following information:

a. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and

b. Describe the use or investment of such income.

12. If the complaint alleges a violation of 18 U.S.C. § 1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

13. If the complaint alleges a violation of 18 U.S.C. § 1962(c), provide the following information:

a. State who is employed by or associated with the enterprise.

b. State whether the same entity is both the liable "person" and the "enterprise" under § 1962(c).

14. If the complaint alleges a violation of 18 U.S.C. § 1962(d), describe in detail the alleged conspiracy.

15. Describe the alleged injury to business or property.

16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.

17. List the damages sustained by reason of the violation of § 1962, indicating the amount for which each defendant is allegedly liable.

18. List all other federal causes of action, if any, and provide the relevant statute numbers.

19. List all pendent state claims, if any.

20. Briefly provide any additional information that you feel would be helpful to the court in processing your RICO claim.

IT IS SO ORDERED.

ENTER:

JAMES F. HOLDERMAN
United States District Judge

DATED: February 4, 1991

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,	)	
Plaintiffs,	)	**No. 86 C 7888**
v.	)	
JOSEPH M. SCHEIDLER, et al.,	)	
Defendants.	)	

PLAINTIFFS' RICO CASE STATEMENT

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§ 1962(a), (b), (c), and/or (d).

Plaintiffs' Second Amended Complaint (the "Complaint") alleges that defendants Joseph M. Scheidler, Randall A. Terry, Andrew Scholberg, Timothy Murphy, Pro-Life Action League, Inc. ("PLAL"), and Operation Rescue have violated § 1962(a); that defendants Scheidler, Terry, Scholberg, Murphy, PLAL, Operation Rescue, and Monica Migliorino have violated § 1962(c); and that defendants Scheidler, Terry, Scholberg, Murphy, PLAL,

and Operation Rescue have violated § 1962(d). (These defendants are referred to collectively as the "RICO Defendants.")

2. List each defendant and state the alleged misconduct and basis of liability of each defendant.

Plaintiffs allege that each of the RICO Defendants has conspired to commit and engaged in a pattern of extortionate activities designed to drive clinics that perform abortions out of business. These activities include clinic invasions and blockades; destruction of clinic property; the unlawful taking and parading of fetal remains, and physical attacks on clinic personnel are described in detail in the chart attached hereto as Exhibit A. In addition, the RICO Defendants' liability is based on acts committed by their co-conspirators in furtherance of the conspiracy to drive such clinics out of business through extortionate acts. The co-conspirators' extortionate activities are listed in the chart attached hereto as Exhibit B.[1]

---

[1] Because the pattern of extortionate acts is an ongoing one with illegal activities continuing to date, and because certain RICO Defendants and co-conspirators have asserted their Fifth Amendment privilege rather than answer questions propounded in the discovery, plaintiffs' investigation continues, and the information in Exhibits A and B is necessarily incomplete.

3. List the alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each wrongdoer.

Plaintiffs allege that numerous co-conspirators have joined with defendants to commit extortionate acts designed to drive clinics out of business. These co-conspirators and their wrongful activities are described in detail in Exhibit B. In addition to the co-conspirators listed in Exhibit B, there are hundreds or thousands of unidentified co-conspirators who have joined forces with the RICO Defendants to commit extortionate acts aimed at closing clinics that perform abortions. Pursuant to this Court's protective order of October 20, 1988, the RICO Defendants and others have not disclosed the identities of most of these co-conspirators.

4. List the alleged victims and state how each victim was allegedly injured.

The victims of defendants' illegal and extortionate conduct are all clinics that provide abortion services, all doctors, administrators, and other clinic employees who work at such clinics, all patients who have sought services at such clinics, all prospective patients who will seek services at such clinics, and the National Organization for Women, Inc. ("NOW"), which has as one of its chief purposes the protection of women's rights to reproductive choice, including the right to choose to have an abortion.

The injuries to the victim clinics include being driven out of business, having their businesses interrupted for various periods of time resulting in lost profits, incurring increased security costs, enduring harassment of personnel,

and suffering interference with their contracts with vendors and landlords. Clinics have also suffered decreased employee productivity due to the RICO Defendants' and co-conspirators' disruptive acts. A number of clinic employees have resigned their positions because of defendants' harassment and threats of harassment. Likewise, doctors have resigned their positions with clinics as a result of harassment by defendants. Accordingly, clinics have spent additional resources in the recruitment of physicians and staff.

The injuries to the victim patients include the inability to obtain, or the delay in obtaining, clinic services; increased complication rates resulting from defendants' disruptive acts; and emotional distress intentionally inflicted by the RICO Defendants and co-conspirators through their blockades, clinic invasions, wrongful taking and publicity of possession of fetal remains, the threats disclosure of patient identities, and threats to commit all these and other unlawful acts. The injuries to prospective patients include the impairment of their right to decide when and where to obtain the services, including abortions, that the class member clinics provide.

NOW's injuries include the diversion of its resources to counter the RICO Defendants' and co-conspirators' extortionate acts in order to protect women's reproductive rights. NOW has also suffered physical and verbal assaults and threats on its officers and members who serve as escorts for women seeking abortions and who otherwise seek to protect women's rights to reproductive choice.

5. Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. A description of the pattern of racketeering shall include the following information:

a. List the alleged predicate acts and the specific statutes which were allegedly violated.

The predicate acts alleged by plaintiffs are listed in Exhibits A and B. These acts violate of the Hobbs Act, 18 U.S.C. § 1951. Specifically, by these acts the RICO Defendants have attempted, conspired, or actually threatened or used actual force, violence, or fear to induce or attempt to induce the employees of affected clinics to give up their jobs; to induce or attempt to induce doctors involved with affected clinics to give up their economic right to practice medicine at clinics that provide abortions; to induce or attempt to induce patients of affected clinics to give up their right to obtain services at clinics that provide abortions; and to induce or attempt to induce prospective patients of clinics that provide abortions to give up their constitutional right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force.

b. Provide the dates of the predicate acts, the partici-pants in the predicate acts, and a description of the facts surrounding the predicate acts.

See Exhibits A and B.

c. If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated in particularity." Fed.R.Civ.P. 9(b). Identify the time, place and contents of persons to whom and by whom the alleged misrepresentations were made.

The RICO claims are not based on these predicate acts.

d. State whether there has been a criminal conviction for violation of the predicate acts.

See Exhibits A and B. These charts do not contain all of the RICO Defendants' and their co-conspirators' convictions. Plaintiffs' efforts to obtain this information have been frustrated for several reasons. First, the National Crime Information Center computer often does not include convictions for state misdemeanor charges and ordinance violations, even though these judgments are criminal convictions and there is no question that misdemeanors may constitute extortion for RICO purposes. *Feminist Women's Health Center v. Roberts, et al.*, No. C86-161Z (W.D. Wash., May 5, 1989) (available 1989 WL 56017, at page 8).[2] Also, at their depositions, many of the

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[2] A similar problem occurs even with those felony arrests which result in misdemeanor convictions. For example, Scheidler was arrested for burglary, among other charges, in Pensacola, Florida on April 26, 1986. The felony charges were dismissed, yet no record of the felony arrest or any convictions appears on the criminal record for Scheidler that plaintiffs obtained pursuant to subpoena.

RICO Defendants and their co-conspirators have demonstrated a lack of understanding of what constitutes a conviction,[3] and most of the RICO Defendants claim that they do not maintain files of court orders which set forth the terms of their conditional discharges or probations upon being convicted of an offense.

e. State whether civil litigation has resulted in a judgment in regard to the predicate acts.

Civil litigation has resulted in a number of civil judgments against many of the defendants and their co-conspirators. The following is a list of those lawsuits of which plaintiffs are aware:

Fort Wayne Women's Health Organization v. Wendell Brane, Bryan Brown, Ellen Brown, Northeast Indiana Rescue, et al., unreported decision (N.D. Ind. May 1990) (permanent injunction entered for similar conduct, brought under 42 U.S.C. §1985(3); also found liable under RICO statute).

Portland Fem. Women's Health Ctr.v. Advocates for Life, 859 F.2d 681 (9th Cir. 1988) (court upheld preliminary injunction entered for similar conduct, brought under 42 U.S.C. § 1985(3)).

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[3] For example, many of the RICO Defendants relate that they were arrested, but that the charges were "dropped" after payment of a $100 fine. If the defendants were required to pay a fine, then, of course, the charges were not "dropped" -- there necessarily was a finding or admission of guilt. Apparently, many of the defendants equate a conviction only with a sentence of imprisonment.

Lovejoy Specialty Hospital, Inc. v. Advocates for Life, Inc., 104 Or.App. 596, 802 P.2d 684 (1990) (upholding civil contempt order incarcerating defendants [including Andrew Burnett] until they agreed to obey the preliminary injunction which was entered for similar acts).

New York State National Organization for Women v. Terry, Operation Rescue et al., 886 F.2d 1339 (2d Cir. 1989), *cert. denied*; *Terry v. New York State National Organization for Women*, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990) (upholding permanent injunction entered for conduct nearly identical to that alleged in *NOW v. Scheidler*, 86 C 7888 (N.D. Ill.), but brought under 42 U.S.C. § 1985(3), granted plaintiff's motion for civil contempt and assessed penalties).

Southwestern Medical Clinics v. Operation Rescue, 744 F.Supp. 230 (D. Nev. 1989) (preliminary injunction entered for similar conduct, but brought under 42 U.S.C. § 1985(3), permanent injunction entered August 1990 in unreported decision).

NOW v. Operation Rescue, 747 F.Supp. 760 (D.D.C.1990) (permanent injunction entered for simila. conduct, but brought under 42 U.S.C. § 1985(3)).

Roe v. Operation Rescue, 710 F.Supp. 577 (E.D. Pa. 1989), *aff'd.*, 898 F.2d 142 (3d Cir. 1990) (permanent injunction entered against Operation Rescue for similar conduct under 42 U.S.C. § 1985(3).

Bray v. Alexandria Women's Clinic, cert. granted, No. 90-985, ___ S.Ct. ___, 1991 WL 20459 (1991) (Operation Rescue has appealed the Fourth Circuit's

decision -- the case was known below as *NOW v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) -- upholding the trial court's issuance of a permanent injunction against Operation Rescue for similar conduct, but brought under 42 U.S.C. § 1985(3)).

Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir. 1989); *cert. denied, McMonagle v. Northeast Women's Center*, 110 S.Ct. 261, 107 L.Ed.2d 210 (1989) (injunction upheld after finding of liability under RICO 1962(c)).

Feminist Women's Health Center v. Roberts, et al., 1989 WL 56017 (W.D. Wash., May 5, 1989) (suit brought under RICO and 42 U.S.C. § 1985(3), based on illegal extortionate activities which drove clinic out of business in 1984, including at least one defendant's aiding and abetting Curtis Beseda in arson).

f. Describe how the predicate acts form a "pattern of racketeering activity.

(1) The Racketeering Activity

The predicate acts listed in Exhibits A and B -- clinic blockades; harassment of clinic patients; clinic invasions; kidnapping of clinic personnel; destruction of clinic property and advertisements; bombing and arson; the unlawful removal of fetal remains; the storage, transportation, and disposal of fetal remains taken illegally; unlawful interference by threats and otherwise with leases and other legal contracts; and agreements to commit all of these acts -- violate the Hobbs Act, 18 U.S.C. § 1951.

Hobbs Act violations are in turn deemed racketeering activity under RICO. 18 U.S.C. § 1961(1).

The Hobbs Act provides as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined...
>
> (b) As used in this section --
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear...

18 U.S.C. § 1951. The right of the putative class clinics to conduct business and to make business decisions free of threats and coercion is "property" under the Hobbs Act. *United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986); *cert. denied*, 479 U.S. 1093 (1987); *Northeast Women's Center v. McMonagle*, 689 F.Supp. 465 (D.C. Pa. 1988). The RICO Defendants and their co-conspirators have deprived or attempted or conspired to deprive clinics, clinic personnel, patients, and prospective patients of their right freely to provide and obtain abortion services. They have done so through the destruction of clinic buildings, equipment and supplies; attempts or threats of the exercise of physical force against clinic employees; clinic invasions; clinic blockades; threats of reprisals to clinic employees

and/or their families; harassment of patients; threatened disclosure of patient and doctor identities; actual disclosure of clinic identities; and actual interference with clinic contracts. Those who have unlawfully taken fetal remains and stored, transported and disposed of those remains have done so as part of the conspiracy to deprive clinics, patients, clinic personnel, and doctors of their respective rights to provide and receive abortions.

(2) The Pattern

The hundreds of incidents of clinic blockades; invasions; bombings; arson; threats to clinic employees; harassment of patients and staff; unlawful taking of fetal remains; and publicized possession of those remains directed to close clinics that perform abortions have occurred continuously since the formation of PLAL in 1980, the formation of the Pro-Life Action Network ("PLAN") in 1984 or earlier, and the formation of Operation Rescue in 1986. These acts therefore constitute a pattern of extortionate racketeering activity. *See Sedima, S.P.R.L. v Imrex Co.*, 473 U.S. 479, 496 n.14 (1985).

g. State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe in detail.

The predicate acts reported in Exhibits A and B are related in that they have been organized and executed by the RICO Defendants and their co-conspirators to further the enterprises' goal of closing through extortionate acts, all women's health centers that provide abortion services. Since 1986, the clinic blockades (which the defendants and their co-conspirators now typically call "rescues") have

followed a regimen planned, organized and executed by Operation Rescue. Clinic invasions and blockades have been conducted in accordance with systematic training provided to participants by Terry, Scheidler, Scholberg, Murphy, Migliorino, and their co-conspirators. The harassment of patients and clinic personnel likewise follows specific guidelines generated by Scheidler, PLAL, Scholberg, Murphy, and other co-conspirators. The unlawful taking and publicized possession of fetal remains taken from Vital-Med Laboratories, Inc. ("Vital-Med"),[4] along with the disclosure of clinic identities and the threatened disclosure of patient and doctor identities, were orchestrated over a 10-month period by Murphy and Migliorino and conducted with the participation of RICO Defendants Scheidler, PLAL, Scholberg, and co-conspirator Wojnar. The removal of the remains and corresponding publicity were conducted in furtherance of the PLAL, Operation Rescue and PLAN goal of closing clinics that perform abortions.

The predicate acts are separate occurrences, however. They have been organized by different combinations of the RICO defendants and their co-conspirators, have been directed at different clinics, have occurred on different dates in different cities with different participants, and have resulted in distinct injuries to particular clinics and their patients and personnel. *See Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1304 (7th Cir. 1987); *cert. denied*, 109 S.Ct. 3241 (1989) (continuity and relationship are determined by "the number and variety of predicate acts and the length of time over which they were committed, the

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[4] Defendant Vital-Med is sued for antitrust violations and breach of confidentiality, but not RICO violations.

number of victims, the presence of separate schemes and the occurrence of distinct injuries").

6. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:

a. State the names of the individuals, partnerships, corporations, associations, or other legal entities, which allegedly constitute the enterprise;

b. Describe the structure, purpose, function and course of conduct of the enterprise;

c. State whether any defendants are employees, officers or directors of the alleged enterprise;

d. State whether any defendants are associated with the alleged enterprise;

e. State whether you are alleging that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself, or members of the enterprise; and

f. If any defendants are alleged to be the enterprise itself, or members of the enterprise, explain whether such defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

The enterprises for Count II of the Second Amended Complaint, brought under § 1962(a), are PLAN, PLAL, and Operation Rescue. The enterprise for Count III, brought under § 1962(c), is PLAN. The enterprises for Count IV's claim of conspiracy to violate §§ 1962(a) and 1962(c) are PLAN, PLAL, and Operation Rescue.

(1) The PLAN Enterprise

PLAN is comprised of RICO defendants Scheidler, PLAL, Scholberg, Murphy, Migliorino, Terry, Operation Rescue, and Project Life, along with co-conspirators Ryan, PDAL, Andrew Burnett, and Peter Lennox.

PLAN is structured as a coalition of anti-abortion extremists and their locally-based organizations who organized sometime before 1984 with the intent to prevent abortions by means not limited to those allowed by the law. *See In Re Energy Systems Equipment Leasing Sec. Litig.*, 642 F.Supp. 718, 740 (E.D.N.Y. 1986) (a coalition of groups may be an enterprise). In 1985, the coalition adopted the name PLAN for their organization. PLAN has a leadership council comprised of regional representatives. In 1987, those representatives included RICO Defendants Scheidler and Terry, along with co-conspirator Ryan.

PLAN's objective is to close clinics that perform abortions through the commission of extortionate acts. As PLAN has evolved, its objectives have included creating a threatening and intimidating atmosphere at clinics; urging followers to ignore local and national laws and instead answer to "higher laws," as announced by PLAN leaders; promoting an impression of unity in the anti-abortion movement; sponsoring clinic blockades in Atlanta, Georgia,

Cherry Hill, New Jersey, New York City, New York, and Los Angeles, California, among other cities; and organizing National Days of Rescue at multiple clinics across the country on October 29, 1988 and other dates, including one that is planned for March 25-30, 1991. Terry has dubbed the March 1991 blockades the "Holy Week Rescues."

PLAN has functioned through annual meetings in which Scheidler, Scholberg, Murphy, Terry, Migliorino and co-conspirator Ryan have participated as organizers, leaders and/or speakers and through smaller interim meetings of PLAN leaders. PLAL and co-conspirator PDAL have hosted PLAN conventions.

PLAN has followed a course of conduct consisting of annual conventions beginning with the "Action for Life" conference held in Fort Lauderdale, Florida on May 10-12, 1984. At the second annual conference in April 1985, conference participants named their coalition "PLAN." PLAN's third annual conference took place in St. Louis, Missouri. A mini-conference of PLAN leaders occurred in St. Louis on December 14, 1986. The 1987 PLAN Convention was held from April 30 to May 2, 1987 in Atlanta, Georgia. On August 25-27, 1988, the 1988 PLAN Convention occurred in Chicago, Illinois. The 1990 PLAN convention was held in Houston, Texas. At these conventions goals are articulated, training sessions for clinic blockading are presented, and "field training" in clinic blockades, at which hundreds of participants have been arrested, is conducted.

Under PLAN's auspices, Operation Rescue was created in 1986. Brochures for Operation Rescue have promoted PLAN leaders Scheidler, Scholberg, PLAL, Terry, Ryan, PDAL, and other co-conspirators as the organization's co-

sponsors. Through its members, PLAN has also sponsored a National Day of Rescue, held on October 29, 1988, during which Operation Rescue blockades took place in some 40 cities in the United States and Toronto, Canada. Nearly 2,500 persons were arrested at these blockades.

Upon information and belief, no RICO Defendants are employees, officers, or directors of PLAN. PLAN's leadership, however, includes Scheidler, Scholberg and Terry. The leadership refers to itself, among other things, as a "Steering Committee" or a "Leadership Council."

The RICO Defendants and Migliorino are all associated with PLAN.

Plaintiffs allege that the RICO Defendants are individuals and entities separate from PLAN.

(2) The PLAL Enterprise

PLAL is comprised of Scheidler, Scholberg, Murphy (collectively, the "PLAL Defendants"), and hundreds of members who have not been identified pursuant to this Court's protective order of October 20, 1988.

PLAL is structured as a 501(c)(3) corporation with its principal place of business in Chicago, Illinois. Further information about the corporation's structure is unavailable because the PLAL Defendants have refused to respond to plaintiffs' discovery requests concerning PLAL's current structure. A motion to compel PLAL's response is currently pending before Magistrate Weisberg.

PLAL's purpose and function are the disruption and closing of women's health centers that perform abortions through the use of illegal activities, including the destruction of clinic property, clinic blockades, harassment of clinic patients, threats of reprisals against clinic employees, and other illegal methods outlined in Scheidler's book, *Closed: 99 Ways to Stop Abortion*.

PLAL's course of conduct is the sponsorship and organization of efforts to close specific clinics, as well as the encouragement and incitation of unlawful extremist acts nationwide. Much of PLAL's budget is spent on telephone, mailings and travel for Scheidler to train and incite other extremist co-conspirators or potential co-conspirators nationwide. PLAL has sponsored and organized individual clinic blockades, PLAN conventions and workshops to encourage local residents to take part in unlawful activities directed at driving women's health centers out of business (*e.g.*, the March 25, 1986 workshop in Pensacola, Florida). PLAL was among the co-sponsors of Operation Rescue in March 1987 and the National Day of Rescue held on October 29, 1988. Currently, PLAL works hand in hand with the local Operation Rescue chapter in Chicago to arrange clinic blockades in the metropolitan Chicago area and elsewhere.

Scheidler has been the executive director of PLAL at all times relevant to this lawsuit.[5] Scheidler's wife, Ann

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[5] Current financial data is not available to the plaintiffs, but a motion to compel discovery from the PLAL Defendants is pending, as noted above. However documents that plaintiffs have obtained show that in 1986, PLAL had income over $118,000 and in the same year Scheidler was paid a salary of over $45,000 from PLAL.

Scheidler, is listed on PLAL letterhead as Administrator for the organization. She, too, receives a salary from the organization, the amount of which the PLAL Defendants have thus far refused to disclose. From February 1988 until very recently, Scholberg was the assistant director of PLAL. Previously, Scholberg was a PLAL employee. He is currently an employee of co-conspirator Wojnar. Murphy has been employed by PLAL since September 1988. Previously, Murphy was a PLAL volunteer. These defendants are associated with PLAL by virtue of their positions in the corporation and their respective roles in its activities. Migliorino is also associated with PLAL as a volunteer in PLAL-approved and PLAL-sponsored activities.

RICO Defendants Scheidler, Scholberg, Murphy, and Migliorino are separate from the PLAL enterprise. PLAL is the enterprise itself and is the instrument through which Scheidler, Scholberg, and Murphy conduct a pattern of racketeering activity.

(3) The Operation Rescue Enterprise

Operation Rescue is comprised of Terry, Project Life, Scheidler, PLAL, Scholberg, Murphy, co-conspirators Ryan and PDAL, and participants in Operation Rescue activities who have not been identified pursuant to the Court's protective order of October 20, 1988.

Operation Rescue is structured as an unincorporated association with principal offices, until very recently, in Binghamton, New York. Operation Rescue has had an identifiable logo, printed letterhead, employees, and numerous bank accounts. Although Operation Rescue has

refused to provide financial information requested by plaintiffs, the former bookkeeper of Operation Rescue testified in a another case that in 1989 the organization received income of at least $777,000. She further detailed the work of some 10 to 15 employees, whose compensation ranged up to $800 per week each, who either worked at Operation Rescue or were employed as "consultants" to the organization.

Operation Rescue's purpose and function are to disrupt and close women's health centers that perform abortions through the use of illegal activities, especially clinic blockades. Operation Rescue teaches its followers to ignore state, local and federal laws and instead to answer to "higher laws," as announced by Terry and other Operation Rescue leaders.

Operation Rescue's course of conduct is the sponsorship of clinic blockades nationwide at which both local and non-resident co-conspirators engage in acts of criminal trespass, resisting arrest, blocking clinic ingress and egress and harassment of persons attempting to exit or enter the clinic. The blockades are conducted in accordance with guidelines issued by Operation Rescue. Participants often wear rain slickers or other clothing with "Operation Rescue" printed on the back. Operation Rescue encourages the formation of local Operation Rescue chapters to carry on its work in various regions of the country, although it urges members of such groups to pretend they have no relation to Operation Rescue's national organization.

From its formation in 1986 through 1990, Terry was the executive director of Operation Rescue. In late 1989, if not earlier, Operation Rescue began its attempt to avoid

legal responsibilities relating to judgments and fines imposed against it by courts nationwide. To this end, Operation Rescue began sending out instructions to its membership to send contributions to locations other than the Binghamton office. These letters noted, for example, that "the government can seize our [Binghamton] post office box and all the gifts which our supporters send to it," and contributors were told "please do not send any gifts to the Binghamton office." One letter was sent in an envelope marked "we're going underground." Defendants claim that Operation Rescue is currently being run by Executive Director Keith Tucci from an office in Sommerville, South Carolina. When called, however, the Binghamton telephone number is still answered "Operation Rescue."

Project Life, Scheidler, Scholberg, Murphy, and PLAL are associated with Operation Rescue in that they have assisted in the sponsorship, organization, and execution of clinic blockades sponsored by Operation Rescue. While many of Operation Rescue's rallies and meetings are open to the public, the planning of specific anti-clinic activities is generally conducted in secret sessions open only to the Operation Rescue inner circle. Typically, only individuals who have been arrested for acts directed at specific clinics and those who are well known for their support of extremist acts are allowed to attend.

Each of the RICO Defendants is separate from Operation Rescue, with the exception of Operation Rescue itself. Operation Rescue is the instrument through which Terry, as well as the other RICO Defendants, have conducted their pattern of racketeering activity.

7. State and describe in detail whether you are alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

The PLAN, PLAL, and Operation Rescue enterprises and the alleged pattern of racketeering activity are separate. PLAN, PLAL, and Operation Rescue are entities with articulated goals and identifiable leaders. The pattern of racketeering activity is a continuous series of extortionate acts against clinics that perform abortions, including a barrage of clinic blockades, clinic invasions, physical violence to clinic personnel and property, and other acts which extort from clinics, their patients, their employees and volunteers, and their prospective patients the right to provide and receive abortion services.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

The usual and daily activities of the enterprises are the sponsorship and organization of events to close clinics and the activities incident to the sponsorship and organization of clinic blockades, clinic invasions, harassment of patients and personnel, training sessions in techniques for these activities, fundraising efforts for PLAL and Operation Rescue, and special events such as conventions and awards programs. These incidental activities include calling co-conspirators, drafting and printing promotional materials for events, fund-raising, drafting and printing newsletters, bookkeeping, and the like. The pattern of racketeering

activity, on the other hand, consists of the events and extortionate activities sponsored and organized by the enterprises.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

The PLAN enterprise, as well as the PLAL and Operation Rescue enterprises, all receive monetary benefits from the enterprises. RICO Defendants Scheidler, Scholberg, Murphy, and Terry (and co-conspirator Wojnar) derive their salaries from proceeds of the enterprises. Funds derived from the enterprises also pay for these defendants' travel to other cities to engage in and to promote further illegal activity. Each of the RICO Defendants and many of the co-conspirators frequently send out solicitations for donations to the enterprises which support their continued illegal acts against clinics that perform abortions. Contributions are sent to the RICO Defendants and others for the purpose of supporting these illegal acts. It is well-known that the more outrageous and highly-publicized the activities are, the more likely the RICO Defendants and the enterprises are to receive large donations.

10. Describe the effect of the activities on interstate or foreign commerce.

A substantial percentage of the patients at the named plaintiff clinics come from states other than the state in which those clinics are located, and a substantial portion of medical supplies, equipment and services are purchased by the named plaintiff clinics from out-of-state sources.

Because the RICO Defendants have conspired to drive all clinics that perform abortions out of business, and because each clinic engages in interstate commerce, the pattern of racketeering activity affects interstate commerce.

In addition, the RICO Defendants travel throughout the country to further their goal of closing down all clinics which perform abortions. They travel both to blockade clinics and to hold seminars and training sessions on how, for example, to blockade a clinic, resist arrest by "going limp" and tie up telephone lines by making false appointments.

The RICO Defendants also use interstate telephone lines and the U.S. Postal Services, inter alia, to arrange illegal acts, solicit contributions to fund these illegal acts and publicize their participation in these illegal acts.

Defendants PLAL, Operation Rescue, Terry, and Scheidler have all received monetary benefits from the nationwide distribution of their publications.

Defendants Murphy, Migliorino and Scheidler, as well as other co-conspirators, have crossed state lines and used interstate telephone and/or mail communications to wrongfully take fetal remains from Vital-Med. Those remains were previously shipped to Vital-Med through interstate commerce. These actions resulted in the cancellation of a contract between defendant Vital-Med, the Illinois laboratory from which the specimens were removed, and the plaintiff clinics, Delaware Women's Health Organization ("DWHO") in Delaware, and the Summit Women's Health Organization ("Summit") in Wisconsin.

11. If the complaint alleges a violation of 18 U.S.C. § 1962(a), provide the following information:

a. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and

b. Describe the use or investment of such income.

See answer to No.6 and 9.

12. If the complaint alleges a violation of 18 U.S.C. § 1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

The complaint does not allege a violation of 18 U.S.C. § 1962(b).

13. If the complaint alleges a violation of 18 U.S.C. § 1962(c), provide the following information:

a. State who is employed by or associated with the enterprise.

RICO Defendants Scheidler, Scholberg, Murphy, Terry, and Migliorino, each persons under 18 U.S.C. § 1961(3), are associated with the PLAN enterprise by virtue of their involvement in its annual conventions as speakers and in other capacities. RICO Defendants Terry, Scheidler, Scholberg and other co-conspirators have served, and may continue to serve, on the Steering Committee of this enterprise.

b. State whether the same entity is both the liable "person" and the "enterprise" under § 1962(c).

The PLAN enterprise is not the liable person under 18 U.S.C. § 1962(c).

14. If the complaint alleges a violation of 18 U.S.C. § 1962(d), describe in detail the alleged conspiracy.

a. Conspiracy to Violate § 1962(a).

The RICO Defendants have conspired to use income derived from a pattern of racketeering activity in the establishment and operation of the PLAN, PLAL and Operation Rescue enterprises. In so doing, the RICO Defendants have conspired to violate § 1962(d).

Specifically, the RICO Defendants have conspired to use the proceeds of fund-raising efforts conducted in connection with and enhanced by events sponsored and/or organized by the enterprises, books and tape sales receipts, etc. to fund the enterprises. With these monies, the RICO Defendants fund their travel to PLAN conferences, PLAL workshops, Operation Rescue blockades and other events sponsored, organized and/or executed by the enterprises; pay for publicity of clinic blockades, upcoming workshops, conferences, banquets, etc.; underwrite the publication and operation of enterprise newsletters and telephone hotlines; and pay other expenses arising out of the operation of the enterprise.

b. Conspiracy to Violate § 1962(c).

The RICO Defendants have conspired to conduct and participate in PLAN's affairs through a pattern of racketeering activity, in violation of § 1962(d). In particular, the RICO Defendants have conspired to conduct massive clinic blockades, denominated "field training," as part of annual PLAN conference agendas. The RICO Defendants have further conspired to participate in PLAN's affairs by organizing, promoting and appearing at "National Days of Rescue" -- resulting in thousands of arrests, including those of the RICO Defendants -- and massive clinic blockades in New York City, Atlanta, Los Angeles, and other cities across the nation.

15. Describe the alleged injury to business or property.

Named plaintiffs DWHO and Summit have suffered the following injuries to their business and property:

1. increased costs for laboratory services;

2. increased insurance costs for the clinics;

3. increased costs for security guards;

d. increased costs for rental space;

e. lost business when the RICO Defendants and their co-conspirators physically prevent entry into the clinics.

f. general harassment and fear of harassment and injury to personnel and property.

The other absent class member clinics have suffered these same injuries to their businesses as well as actual destruction of clinic property and equipment, damage to clinic supplies, costs of lost employee productivity due to physical injuries caused by the RICO Defendants, costs of employee absenteeism and turnover due to fear of threatened reprisals, and costs of doctor turnover due to actual and threatened damage to the doctor's professional reputations by the RICO Defendants and their co-conspirators.

16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.

The injuries alleged in response to Item 15 flow directly from the commission of the predicate acts. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 and n.15 (1985). Laboratory service costs for DWHO, Summit, and other clinics affiliated with the Women's Health Organization have increased because Vital-Med cancelled its contract in response to contractual interference by the defendants and in conspiracy with the RICO Defendants. The Women's Health Organization clinics have been unable to find laboratory service vendors willing to risk similar treatment and/or threats of extortion without premium compensation.

Clinic insurance costs have increased because the continuous clinic blockades, invasions, and violence have increased the risk of destruction to clinic buildings, equipment, and supplies.

Security costs have increased for clinics because they must employ security guards and surveillance equipment to

protect clinic property, personnel, and patients from the racketeering activities alleged above.

Clinics have lost business during the hours that they have blockades that prevent persons from entering the clinics.

Clinics have incurred the costs of damaged buildings, equipment and supplies as a direct result of the attacks sponsored, organized, and executed by the RICO Defendants and their co-conspirators. Clinics, likewise, have incurred costs related to employee productivity as a direct result of incidents such as the attack which hospitalized the administrator of the Ladies Center of Pensacola, Inc.

17. List the damages sustained by reason of the violation of § 1962, indicating the amount for which each defendant is allegedly liable.

All the defendants are jointly and severally liable for the entire amount of damages. The named plaintiff clinics have sustained damages by reason of the RICO violations in the following areas:

a. Increased costs for security;

b. Increased costs for insurance;

c. Costs for repairs to clinic property;

d. Increased costs for replacement of services previously provided by Vital-Med;

e. Increased costs to lease clinic space; and

f. Lost business during defendants' disruptive activities.

Because the defendants continue to engage in illegal activities, the total damage to the named plaintiff clinics cannot yet be calculated. Therefore, plaintiffs' damages are ongoing.

18. List all other federal causes of action, if any, and provide the relevant statute numbers.

Section 16 of the Clayton Act, 15 U.S.C. § 26 and Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

19. List all pendent state claims, if any.

The complaint alleges tortious interference with prospective economic advantage against defendants Scheidler, Scholberg, Murphy, Migliorino, Wojnar, and PLAL. The complaint alleges tortious interference with existing business relationship against defendant Migliorino. The complaint alleges breach of duty of confidentiality against defendant Vital-Med.

20. Briefly provide any additional information that you feel would be helpful to the court in processing your RICO claim.

Plaintiffs hope that the information provided above and in the exhibits attached hereto sufficiently answer the

questions posed by the Court in its RICO Case Statement order. However, plaintiffs will make every effort to satisfy any requests by the Court to provide whatever additional information the Court might consider helpful.

Plaintiffs respectfully suggest that it might be helpful if this Court were to set a schedule for determination of remaining pretrial issues, a discovery cut-off date, submission of pretrial orders, and to schedule all other pretrial matters.

Respectfully submitted,

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One of the Attorneys for the
Plaintiffs, NOW, *et al.*

Fay Clayton, Esq.
Susan Valentine, Esq.
ROBINSON CURLEY & CLAYTON, P.C.
200 West Adams Street
Suite 2701
Chicago, Illinois 60606
(312) 855-0955

Judi A. Lamble, Esq.
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000

Patricia Ireland, Esq.
Executive Vice President
NATIONAL ORGANIZATION FOR WOMEN, INC.
1000 16th Street, N.W.
Suite 700
Washington, D.C. 20036-5705
(202) 331-0066

Alan Pollack, Esq.
POLLACK & GREENE
488 Madison Avenue
New York, New York 10022
(212) 688-5558

RICO DEFENDANTS

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Migliorino		Milwaukee, WI/Affiliated Medical Services	Harassment of persons outside clinic and/or blockade	Subject of civil suit for violation of municipal code
Migliorino		Milwaukee, WI	Arranged transportation of fetal remains taken from Vital-Med to Fargo, ND so local co-conspirators could publicize their possession of the remains	
Migliorino	1980	Chicago, IL/ Concord clinic	Clinic blockade by 20 persons	Yes
Migliorino	1984	Chicago, IL/ American Women's Health Center	Harassment of persons outside clinic and/or blockade	Unknown
Migliorino	6/16/84	Milwaukee, WI	Harassment of persons outside clinic and/or blockade	Yes
Migliorino	before 7/21/84	Milwaukee, WI	Helped organize 7/21/84 blockade	
Migliorino	7/21/84	Milwaukee, WI or Chicago, IL	Clinic blockade and invasion by 75-100 persons; 25 blockaded; 6-8 harassed persons outside clinic	Yes, including Migliorino

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CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Migliorino	before 5/11/85	Milwaukee, WI	Organized 5/11/85 invasion of Albany Clinic	
Migliorino	5/11/85	Chicago, IL/ Albany Women's Medical Center	Clinic invasion and blockade by 50 persons; 14-15 invaded clinic; 4-6 harassed persons outside clinic; participant chained herself to plumbing pipe	15, including Migliorino, arrested for disorderly conduct
Migliorino	6/22/85		Clinic blockade by 30 to 40 persons	Yes
Migliorino	before 7/20/85		Organized blockade of 7/20/85	
Migliorino	7/20/85	Chicago, IL/ Park Medical Center	Clinic blockade by 50 persons; 2 persons invaded clinic; persons chained themselves to interior banister	21 arrested for disorderly conduct, including Migliorino
Migliorino	7/21/85	Chicago, IL/ Biogenetics clinic	Organized and participated in clinic blockade; helped recruit participants and led meeting at PLAL office	Sixteen, including Migliorino
Migliorino	before 10/11/85	Milwaukee, WI	Organized clinic blockade of 10/11/85	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Migliorino	10/11/85	Chicago, IL/ 1130 S. Michigan Ave. clinic	Clinic invasion and blockade by 25 persons; tampered with equipment	Seven, including Migliorino, arrested for disorderly conduct
Migliorino	1986	Milwaukee, WI	Presented petitions signed by building patrons to landlords to threaten them to terminate clinic lease	
Migliorino	1/86, 2/86	Milwaukee, WI	Organized 3/8/86 clinic blockade	
Migliorino	3/8/86	Milwaukee, WI/ Bread and Roses	Clinic blockade by 50 persons; 10 blocked door; 2 invaded clinic and harassed patients; 4 handcuffed themselves to equipment in clinic	9 arrested for criminal trespassing; 5 arrested for disorderly conduct, including Migliorino; (all convicted; Migliorino sentenced to 45 days in jail)
Migliorino	3/26/86	Pensacola, FL/ Ladies Center	Clinic blockade by 50 persons; destruction of clinic equipment and supplies	Six
Migliorino	4/5/86	Milwaukee, WI	Organized clinic blockade of 5/10/86	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Migliorino	5/10/86	Milwaukee, WI/ Women's Health Organization	Clinic blockade by 40 persons; 20 made human chain; 2 invaded clinic and harassed patients; one handcuffed himself to doorknob in clinic	About nine
Migliorino	before 10/6/86	Milwaukee, WI	Organized 10/6/86 clinic blockade	
Migliorino	10/6/86	Milwaukee, WI/ Bread and Roses	Clinic blockade by 7 persons; 2 handcuffed themselves to clinic's moving van; 5 blocked entrance; Migliorino "oversaw the event"	Three
Migliorino	before 1/7/87	Milwaukee, WI	Organized 1/7/87 clinic blockade	
Migliorino	1/7/87		Clinic blockade by 30-40 persons; 2 handcuffed themselves to chairs in waiting room; others blockaded door; 4-6 harassed persons outside clinic	Seven, including Migliorino (convicted)
Migliorino	1/10/87	Milwaukee, WI/ Affiliated Medical Services	Clinic blockade	Unknown

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Migliorino	2/27/87	Milwaukee, WI/ Affiliated Medical Services	Migliorino invaded clinic and harassed patient	Yes
Migliorino	9/19/87	Detroit, MI	Clinic blockade by 100 persons	Yes, including Migliorino; arrested for disorderly conduct
Migliorino	before 10/10/87	Milwaukee, WI	Organized 10/10/87 clinic blockade; conspired with persons to chain themselves to door	
Migliorino	10/10/87		Clinic blockade by 30 persons; cars blocked clinic doors; persons chained to front door handle; 4-6 harassed persons outside clinic	Unknown
Migliorino	1988	Milwaukee, WI	Conspired to and did store fetal remains taken from Vital-Med during non-business hours for future use in publicity aimed at threatening clinics, their doctors, patients and vendors	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Migliorino	2nd week of Feb/88 4/01/88 6/20/88 9/07/88	Northbrook, IL	Took fetal remains from Vital-Med during non-business hours 12x over a 10-month period	
Migliorino	around 3/25/88 9/10/88 11/19/88		Organized publicity of possession of fetal remains taken from Vital-Med	
Migliorino	3/25/88	Milwaukee, WI/ Holy Cross Cemetery	Publicized possession of fetal remains taken from Vital-Med	
Migliorino	4/23/88	Milwaukee, WI/ Bread and Roses	Clinic blockade; blocked clinic door with cars; chained doors shut	Nine
Migliorino	5/2/88	New York City	Clinic blockades by 700 to 800 persons	Yes
Migliorino	5/3/88	New York City/ Herbert Schwartz clinic	Clinic blockades by 500 to 600 persons	503, including Scheidler, Migliorino; arrested for disorderly conduct
Migliorino	7/88	Chicago, IL	Publicized possession of fetuses taken from Vital-Med	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Migliorino	before 8/6/88	Tallahassee, FL	Transported 729 fetal remains taken from Vital-Med so local co-conspirators could publicize their possession of the remains	
Migliorino	8/6/88	Tallahassee, FL/Medical Center	Clinic blockade - part of "Free Joan Andrews Campaign"	Unknown
Migliorino	around 8/6/88	Tallahassee, FL	Participated in publicity of possession of fetal remains removed from Vital-Med	
Migliorino	before 8/10/88	Milwaukee, WI	Organized 8/10/88 blockade	
Migliorino	8/10/88		Clinic blockade by 175 persons	Unknown
Migliorino	8/25-27/88	Chicago, IL	Conspired with others at PLAN conference to close clinics through extortionate acts, including blockades at two clinics on 8/29/88; Migliorino featured as speaker	
Migliorino	8/27/88	Chicago, IL	Blockade of two Chicago clinics, including "lock and block"	Sixteen, arrested for disorderly conduct

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Migliorino	before 9/23/88		Organized blockade of 9/23/88	
Migliorino	9/23/88		Clinic blockade by 20 persons; 2 chained to car in front of clinic door	Two
Migliorino	around 9/29/88	Jamestown, N.D.	Conspired to and did ship fetal remains removed from Vital-Med to Jamestown so local co-conspirators could publicize their possession of the remains	
Migliorino	before 11/12/88		Helped organize clinic blockade	
Migliorino	11/12/88	Milwaukee, WI	Clinic blockade by over 100 persons	Unknown
Migliorino	2/8/89	Milwaukee, WI/ Bread and Roses	Clinic blockade by 25 persons	Yes
Migliorino	2/15/89	Milwaukee, WI/ Bread and Roses	Clinic blockade; blocked doors with cars; chained doors shut	Unknown
Migliorino	4/15/89	Milwaukee, WI	Clinic blockade by over 100 persons	Yes, including Migliorino
Migliorino	before 6/8/89		Organized blockade of 6/8/89	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Migliorino	6/8/89		Clinic blockade by 40 persons; several locked themselves together with cryptonite locks	Unknown
Migliorino	12/8/89	Chicago, IL	Clinic blockade by 25 persons; 2 cars blocked door of clinic	3-4 arrested for trespass or violation of city ordinance
Migliorino	3/9/90		Clinic blockade by 75 persons; blocked clinic door with cars	Unknown
Murphy	3/26/86	Pensacola, FL	Clinic blockade by 50 persons	Six
Murphy	4/30/87-5/2/87	Atlanta, GA	Conspired with others at PLAN conference to close clinics through extortionate acts, including clinic blockades in Atlanta in May 1987	
Murphy	5/2/87	Atlanta, GA/ Women's Health Center	Clinic blockade	79
Murphy	10/10/87		Clinic blockade by 30 persons; participants chained themselves to clinic door; cars blocked clinic doors; harassment of persons outside clinic	Unknown

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Murphy	10/11/87	Milwaukee, WI	Harassment of persons outside clinic and/or blockade	Yes
Murphy	1988	Chicago, IL	Conspired to and did store fetal remains taken from Vital-Med during non-business hours for future use in publicity aimed at threatening clinics, their doctors, patients, and vendors	
Murphy	1988	Chicago, IL	Conspired to ship and transport fetal remains removed from Vital-Med to other cities so local co-conspirators could publicize their possession of the remains	
Murphy	1/88 (1st Visit)	Northbrook, IL	Took boxes of fetal remains from Vital-Med during non-business hours	
Murphy	1/88 (2nd Visit)	Northbrook, IL	Took boxes of fetal remains from Vital-Med during non-business hours	
Murphy	2/88	Chicago, IL	Harassment of persons outside clinic and/or blockade	Yes; arrested for disorderly conduct

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Murphy	2/88 (3rd Visit)	Northbrook, IL	Took boxes of fetal remains from Vital-Med during non-business hours	
Murphy	2/88-5/88 3x a week	Northbrook, IL	Took fetal remains from Vital-Med during non-business hours	
Murphy	5/88	Queens, NY	Clinic blockade	Yes
Murphy	5/2-6/88	New York City, Long Island, NY	Harassment of persons outside clinics and Clinic blockades	Hundreds
Murphy	7/88	Northbrook, IL	Took fetal remains from Vital-Med during non-business hours	
Murphy	8/25-27/88	Chicago, IL	Conspired with others at PLAN Conference to close clinics through extortionate acts, including blockades of two clinics on 8/28/88; Murphy featured as speaker	
Murphy	8/27/88	Chicago, IL	Blockade at two clinics, "lock & block"	Sixteen; arrested for disorderly conduct, resisting arrest
Murphy	8/88	Tallahassee, FL	Clinic blockade	Five, including Murphy

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Murphy	8/88 or 9/88	Chicago, IL	Shipped fetal remains by UPS to Lucy O'Keefe in Raleigh, N.C. so local co-conspirators could publicize their possession of the remains	
Murphy	9/88	Materi, LA	Harassment of persons outside clinic and/or blockade	Yes
Murphy	9/88	Wichita, KS	"Lock & block" clinic blockade	Yes
Murphy	10/88		Conspired with other PLAN participants to organize simultaneous clinic blockades around the country, resulting in 2,500 arrests	
Murphy	10/28/88	Chicago, IL	"Lock & block" clinic blockade	Arrested for disorderly conduct
Murphy	11/88	Chicago, IL	Harassment of persons outside clinic and/or blockade	Yes
Murphy	11/88		Conspired with Migliorino to use cryptonite locks and cars to assist in clinic blockades	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Murphy	1/89	St. Louis, MO	Clinic blockade	Yes
Operation Rescue	3/26/86		Clinic blockade by 50 persons	Six
Operation Rescue	11/27/87	Cherry Hill, NJ/Cherry Hill Women's Center	Clinic blockade; harassment of persons outside clinic and/or blockade	200
Operation Rescue	3/3/88	Queens, NY/ Women's Center	Clinic blockade	Unknown
Operation Rescue	3/12/88	St. Louis, MO/ Euclid Ave. Clinic	Trespassing	Unknown
Operation Rescue	3/26/88	St. Louis, MO/ Regency Park Clinic	Clinic invasion	Unknown
Operation Rescue	4/2/88	St. Louis, MO/ Euclid Ave. Clinic	Clinic blockade	Yes
Operation Rescue	4/16/88	St. Louis, MO/ Regency Park Clinic	Clinic invasion/participants posed as patients/harassment of persons outside clinic and/or blockade	Yes
Operation Rescue	4/23/88	St. Louis, MO/ Euclid Ave. Clinic	Trespassing	Yes

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Operation Rescue	5/88	Chicago, IL/ Northside Clinic	Harassment of persons outside clinic and/or blockade	Yes
Operation Rescue	before 5/2/88		Conspired to and organized week-long clinic blockades in New York	
Operation Rescue	5/2/88	New York City/ Herbert Schwartz Clinic	Clinic blockade by 700-800 persons	Yes, including Terry, Scheidler
Operation Rescue	5/3/88	Queens, NY/ Women's Health Services	Clinic blockade by 500 persons	503, including Scheidler, Migliorino; arrested for disorderly conduct
Operation Rescue	5/5/88	Long Island, NY/Women's Choice Gynecological Center	Clinic blockade	401
Operation Rescue	5/6/88	New York City	Clinic blockade	320
Operation Rescue	7/4/88	Philadelphia, PA	Clinic blockade	Unknown
Operation Rescue	7/19/88	Atlanta, GA/ Surgicenter	Clinic blockade by more than 1,200 persons	More than 1,200

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Operation Rescue	8/25-27/88	Chicago, IL	Conspired with others at PLAN Conference to close clinics through extortionate acts, including blockade at two clinics on 8/27/88	
Operation Rescue	8/27/88	Chicago, IL	Blockaded two clinics, including "lock & block"	Sixteen; arrested for disorderly conduct
Operation Rescue	10/88		Conspired with other PLAN participants to organize simultaneous clinic blockades around the country, resulting in 2,500 arrests	
Operation Rescue	10/29/88	40 Cities and Toronto, Canada	Clinic blockade	2,500
Operation Rescue	1989	46 Cities	Harassment of persons outside clinics and/or blockades; resisting arrest	3000
Operation Rescue	1/28/89	Las Vegas, NV/ Family Planning Institute	Harassment of persons outside clinic and clinic blockade	Unknown
Operation Rescue	1/31/89	Las Vegas, NV/ Family Planning Institute	Harassment of persons outside clinic and clinic blockade	Unknown

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Operation Rescue	2/4/89	Las Vegas, NV/ Family Planning Institute	Harassment of persons outside clinic and clinic blockade	Unknown
Operation Rescue	3/7/89	Las Vegas, NV/ Family Planning Institute	Harassment of persons outside clinic and clinic blockade	Unknown
Operation Rescue	3/18/89	Las Vegas, NV/ Family Planning Institute	Harassment of persons outside clinic and clinic blockade	Unknown
Operation Rescue	3/25/89	W. Mooreland, CA/FPA clinic	Clinic blockade	749
Operation Rescue	3/29/89	Long Beach, CA/FPA clinic	Clinic blockade	Unknown
Operation Rescue	4/21/89	Ft. Wayne, IN/ Women's Health Organization	Clinic blockade	100
Operation Rescue	4/24/89	Chicago, IL/ American Women's Medical Group	Harassment of persons outside clinic and/or blockade	Yes
Operation Rescue	4/29/89	Las Vegas, NV/ Family Planning Institute	Harassment of persons outside clinic and blockade	Unknown
Operation Rescue	6/10/89	Ft. Wayne, IN/ Women's Health Organization	Clinic blockade	135

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Operation Rescue	6/13/89	LasVegas, NV/ Family Planning Institute	Harassment of persons outside clinic and blockade	
Operation Rescue	8/12/89	W. Mooreland, CA/FPA clinic	Violent incidents at clinic	Unknown
Operation Rescue	8/25/89	Ft. Wayne, IN/ Women's Health Organization	Clinic blockade	175
Operation Rescue	10/1/89	Chico, CA/ Feminist Health Center	Arson and destruction of clinic property	Unknown
Operation Rescue	10/14/89	Chicago, IL/ American Women's Medical Group	Harassment of persons outside clinic and/or blockade	Yes
Operation Rescue	3/14/90	W. Mooreland, CA/FPA clinic	Harassed persons outside clinic and/or blockade	270
Operation Rescue	5/12/90	San Bernadino, CA/FPA clinic	Harassed persons outside clinic and/or blockade	100
PLAL		Chicago, IL/ Grand Ave. Clinic	Organized clinic blockade and/or harassment of persons outside clinic	Unknown

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
PLAL	6/10-12/84	Kansas City, MO	"Kansas City Agreement" formulated: resolution never to gather in any major city without holding anti-abortion activity aimed at closing down local abortion centers	
PLAL	4/11/85	Appleton, WI	Conspired and formed agenda with others at PLAN conference to close clinics through clinic invasions and other extortionate acts	
PLAL	6/20/85	Washington, D.C./Preterm Clinic	Clinic blockade	Unknown
PLAL	before 7/21/85	Chicago, IL	Hosted meeting to organize clinic blockade of 7/21/85	
PLAL	3/25/86	Pensacola, FL	Conspired with Ryan, John Burt, Joan Andrews, and others to invade clinic and led workshop on closing clinics through extortionate acts	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
PLAL	3/26/86	Pensacola, FL/ Ladies Center	Clinic blockade by 50 persons; destruction of clinic equipment and supplies	Six
PLAL	4/86	St. Louis, MO	Conspired with others at PLAN conference to close clinics through extortionate acts, including clinic blockades, on 4/19/86, in June, August, and December 1986, and January and April 1987	
PLAL	4/19/86	St. Louis, MO/ Regency Park Clinic	Harassed persons outside clinic and blockaded clinic	107
PLAL	6/5/86	Binghamton, NY/Southern Tier Women's Services	Clinic blockade	Unknown
PLAL	4/20/87	Kalamazoo, MI/ Planned Parenthood	Clinic invasion	Unknown
PLAL	4/30/87-5/2/87	Atlanta, GA	Conspired with others at PLAN conference to close clinics through extortionate acts, including blockades in Atlanta in May 1987	May 1987

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
PLAL	5/2/87	Atlanta, GA/ Women's Health Center	Clinic blockade	79
PLAL	9/19/87	Detroit, MI/ Summit Clinic	Clinic blockade	Yes
PLAL	8/25-27/88	Chicago, IL	Hosted 1988 PLAN convention; conspired with others to close clinics through extortionate acts, including blockade of two Chicago clinics	
PLAL	8/27/88	Chicago, IL	Blockade of two clinics, including "lock & block"	Sixteen
PLAL	10/88		Conspired with other PLAN participants to organize simultaneous clinic blockades around the country, resulting in 2,500 arrests	
Scheidler		Silver Springs, CO/ Alternatives Clinic	Clinic invasion	35-40
Scheidler	1980	Chicago, IL/ Concord clinic	Clinic blockade by 20 persons	Yes

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Scheidler	6/28/80	Anaheim, CA	Conspired with others to firebomb clinics; conspired to invade clinics	
Scheidler	1983	Appleton, WI/ Fox Valley Reproductive clinic	Trespassing	Yes
Scheidler	1983	Chicago,IL/ American Women's Medical Group	Clinic invasion; pushed clinic receptionist	Unknown
Scheidler	1/83	Chicago, IL/ Concord clinic	Harassment of persons outside clinic and/or blockade	Unknown
Scheidler	1/29/83	Chicago, IL	Harassment of persons outside clinic and/or blockade	Yes, arrested for disorderly conduct
Scheidler	1984	Norfolk, VA	Harassment of persons outside clinic and/or blockade	Unknown
Scheidler	1/18/84	Cincinnati, OH/Margaret Sanger Planned Parenthood	Clinic invasion	Unknown

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Scheidler	5/10-12/84	Ft. Lauderdale, FL	Conspired with others at National conference to close clinics through extortionate acts; presented workshop on how to harass persons outside clinic and blockade clinic	
Scheidler	5/12/84	Ft. Lauderdale, FL/ Women's Awareness Clinic	Led 200 participants in clinic blockade	Unknown
Scheidler	6/10-12/84	Kansas City, MO	"Kansas City Agreement" formulated: resolution never to gather in any major city without holding anti-abortion activity aimed at closing down local abortion centers	
Scheidler	7/84	Chicago, IL	Organized harassment of persons outside clinic and invasion of Biogenetics clinic	
Scheidler	7/84	Kansas City, MO/Planned Parenthood	Clinic blockade by 200 persons formed human chain around clinic	Two

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Scheidler	7/21/84	Chicago, IL	Harassment of persons outside clinic and/or blockade; trespass	Yes
Scheidler	7/21/84	Chicago, IL/ Biogenetics clinic	Clinic invasion; some handcuffed themselves to pipes	Eight
Scheidler	4/11/85	Appleton, WI	Conspired and formed agenda with others at PLAN conference for clinic invasions; pledged to create "a year of pain and fear" for those performing or receiving abortions	
Scheidler	4/19/85	Silver Springs, MD/ Alternatives Clinic	Clinic invasion	Four
Scheidler	4/26/85	Columbus, OH	Conspired to close clinics through extortionate acts; participated in Direct Action Workshop of 400 persons on how to close clinics	
Scheidler	5/16/85	Buffalo, NY	Invasion of four clinics	Unknown
Scheidler	6/22/85		Clinic blockade of 30-40 persons	Yes

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Scheidler	before 7/21/85	Chicago, IL Biogenetics clinic	Helped organize clinic blockade of 7/21/85; helped recruit blockade participants at meeting at PLAL office	
Scheidler	7/26/85	Los Angeles, CA	Clinic invasion	Unknown
Scheidler	9/14/85	St. Louis, MO	Clinic blockade	Yes, including Lee, Ryan and O'Brien
Scheidler	10/8/85	Portsmouth, NH/Feminist Center	Clinic blockade	Unknown
Scheidler	10/21/85	Boulder, CO/ Boulder Clinic	Clinic blockade	Unknown
Scheidler	10/28/85	Portland, OR/ Lovejoy Clinic	Clinic invasion	Unknown
Scheidler	11/8/85	Milwaukee, WI/ Metropolitan Medical Services	Clinic invasion	Unknown
Scheidler	1/18/86	Akron, OH/ Akron Women's Clinic	Violated injunction	Unknown

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Scheidler	1/26/86	Pensacola, FL/ Women's Center	Conspired to invade clinic, resulting in destruction to clinic equipment and supplies and injuries to clinic and NOW personnel	
Scheidler	1/29/86	Gainesville, FL/Planned Parenthood and other clinics	Clinic blockades	Unknown
Scheidler	1/30/86	Ocalala, FL/ All Women's Health Center	Trespassed and demonstrated on clinic property in violation of local ruling	Unknown
Scheidler	1/30/86	Orlando, FL	Invasion of two clinics	Unknown
Scheidler	2/12/86	Peoria, IL/ Planned Parenthood	Clinic blockade	Unknown
Scheidler	3/25/86	Pensacola, FL	Conspired with Andrews, Burt, and others to invade Ladies Center clinic and destroy equipment; led workshop on closing clinics through extortionate acts	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Scheidler	3/26/86	Pensacola, FL/ Ladies Center	Clinic blockade by 50 persons; clinic invasion resulting in property destruction	Six, including Burt, Andrews (convicted)
Scheidler	4/86	St. Louis, MO	Conspired with others at PLAN conference to close clinics through extortionate acts, including blockades on 4/19/86 and in June, August, and December 1986, and January and April 1987	
Scheidler	4/4/86	Scottsbluff, NE	Led workshop on harassment of persons outside clinic and/or blockades at Coalition for Life Convention	
Scheidler	4/11/86	Wilmington, DE/DWHO	Clinic invasion; threatened clinic administrator with reprisals if she refused to quit her job	Arrested for criminal trespass and harassment
Scheidler	4/19/86	St. Louis, MO/ Regency Park Clinic	Harassed persons outside clinic and blockaded clinic	107

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Scheidler	5/2/86	Haverhill, MA	Conspired with others to harass persons outside clinics and/or blockade clinics at Right to Life Rose Dinner	
Scheidler	11/28/86	Pensacola, FL/ Ladies Center	Harassment of persons outside clinic and/or blockade by several hundred persons	Seven
Scheidler	12/14/86	Chicago, IL	Conspired with Ryan, Scholberg and others as part of PLAN mini-conference to close clinics through extortionate acts	
Scheidler	4/87	Des Plaines, IL/ Dimensions Center	Clinic invasion	Yes, including Scheidler; arrested for disorderly conduct
Scheidler	4/14/87	Des Plaines, IL	Harassment of persons outside clinic and/or blockade	Yes, arrested for disorderly conduct
Scheidler	4/30/87-5/2/87	Atlanta, GA	Conspired with others at PLAN Conference to close clinics through extortionate acts; Scheidler featured as speaker	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Scheidler	5/2/87	Atlanta, GA/ Women's Health Center	Clinic blockade	79
Scheidler	7/10/87	Chicago, IL/ American Women's Medical Group	Harassment of persons outside clinic and/or blockade	Unknown
Scheidler	7/27/87	Chicago, IL/ American Women's Medical Group	Harassment of persons outside clinic and/or blockade; violence resulted	Unknown
Scheidler	8/21/87	Washington, D.C.	Conspired with other members of PLAN leadership council to close clinics through extortionate acts	
Scheidler	12/12/87	Chicago, IL/ American Women's Medical Group	Harassment of persons outside clinic and/or blockade; violence resulted	Unknown
Scheidler	9/9/87	New Orleans, LA/Causeway Clinic	Harassment of persons outside clinic and/or blockade	Unknown
Scheidler	9/19/87	Detroit, MI/ Summit Clinic	Clinic blockade	Unknown
Scheidler	11/27/87	Cherry Hills, N.J./Cherry Hill Women's Center	Harassment of persons outside clinic and/or blockade	200

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Scheidler	1988	Chicago, IL	Conspired to and did store fetal remains taken from Vital-Med during non-business hours for future use in publicity aimed at threatening clinics, their doctors, patients and vendors	
Scheidler	2/13/88	Park Ridge, IL/ Baker's Square	Conspired to harass persons outside clinic and/or blockade clinic	Unknown
Scheidler	before 5/2/88		Conspired with Terry and others to blockade clinics in New York; designated official marshal for New York City blockades	
Scheidler	5/2/88	New York City/ Herbert Schwartz clinic	Clinic blockade by 700-800 persons	423
Scheidler	5/3/88	New York City/ Herbert Schwartz clinic	Clinic Blockade by 500-600 persons	503 arrested for disorderly conduct, including Scheidler, Migliorino
Scheidler	5/5/88	Long Island, NY/Women's Choice Gynecological Center	Clinic blockade	401

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Scheidler	5/6/88	New York City	Clinic blockade	320
Scheidler	7/88	Chicago, IL	Conspired and organized publicity of possession of fetal remains taken from Vital-Med during non-business hours	
Scheidler	8/25-27/88	Chicago, IL	Conspired with others at PLAN conference to close clinics through extortionate acts, including blockades of two Chicago clinics on 8/27/88	
Scheidler	8/27/88	Chicago, IL	Blockade of two clinics, including "lock & block"	16
Scheidler	10/88		Conspired with other PLAN participants to organize simultaneous clinic blockades around the country, resulting in 2,500 arrests	
Scheidler	1989	Farmington, MI	Clinic blockade by 200 persons	Unknown

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Scheidler	1/89	Wichita, KS	Conspired to ship fetal remains removed from Vital-Med to other cities/states via parcel post so local co-conspirators could publicize their possession of the remains	
Scheidler	3/11/89	Chico, CA/ Feminist Health Center	Clinic blockade	300, including Scheidler
Scheidler	4/1/89	West Hartford, CT/Summit Women's Center	Clinic invasion and blockade	61
Scheidler	6/12/89	West Hartford, CT/Summit Women's Center	Clinic invasion and blockade	261
Scheidler	9/90	Chicago, IL	Conducted training workshop for clinic blockades at Armitage Baptist Church	
Scholberg	3/1/83	Minneapolis, MN	Harassment of persons outside clinic and/or blockade; trespass	Yes
Scholberg	6/83	Minneapolis, MN	Harassment of persons outside clinic and/or blockade	Arrested for disorderly conduct

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Scholberg	3/84	Minneapolis, MN	Harassment of persons outside clinic and/or blockade	Yes
Scholberg	6/84	Minneapolis, MN/Midwest Health Center for Women	Clinic invasion	Arrested for trespass, disorderly conduct (convicted)
Scholberg	1985	St. Louis, MO	Clinic blockade	Arrested (entered a nolo plea; served time in community service)
Scholberg	1985 (2nd time)	St. Louis, MO/ Abortion Center	Clinic blockade	Arrested (entered a nolo plea; served time in community service)
Scholberg	4/19/85	St. Louis, MO/ Regency Park clinic	Clinic blockade	107 including Terry, Andrews
Scholberg	8/85	St. Louis, MO	Clinic blockade	Yes
Scholberg	9/20/85	Minneapolis, MN	Harassment of persons outside clinic and/or blockade; littering; trespassing; resisting arrest	Yes

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Scholberg	1986	Denver, CO/ Planned Parenthood	Clinic blockade	Arrested for trespassing (entered a nolo or guilty plea)
Scholberg	3/26/88	Pensacola, FL	Clinic blockade by 50 persons	Six
Scholberg	4/19/86	St. Louis, MO/ Reproductive Health Center	Harassment of persons outside clinic and/or blockade	Yes
Scholberg	6/86	Denver, CO	Clinic blockade/Trespass	Yes
Scholberg	12/14/86	St. Louis, MO	Conspired with others at PLAN mini-conference to close clinics through extortionate acts	
Scholberg	Spring 1987	Atlanta, GA/ Chamblee clinic	Clinic blockade	Arrested for disorderly conduct or trespassing (entered nolo plea)
Scholberg	4/30/87-5/2/87	Atlanta, GA	Conspired with others at PLAN conference to close clinics through extortionate acts; Scholberg featured as speaker	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Scholberg	5/2/87	Atlanta, GA/ Women's Health Clinic	Clinic blockade	79; arrested for disorderly conduct and/or trespass
Scholberg	6/87	Minneapolis, MN/Meadowbrook	Harassment of persons outside clinic and/or blockade	Yes, including Scholberg; arrested for disorderly conduct
Scholberg	4/29/88	New York City	Clinic blockade	Arrested for disorderly conduct
Scholberg	5/2/88	New York City	Clinic blockade by 700-800 persons	Yes
Scholberg	5/3/88	New York City	Clinic blockade	503
Scholberg	5/5/88	Long Island NY/ Women's Choice Gynecological Center	Clinic blockade	401
Scholberg	5/6/88	New York City	Clinic blockade	320
Scholberg	8/25-27/88	Chicago, IL	Conspired with others at PLAN conference to close clinics through extortionate acts, including blockades of two Chicago clinics on 8/27/88; Scholberg featured as speaker	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Scholberg	8/27/88	Chicago, IL	Blockade of two clinics, including "lock & block"	16
Scholberg	10/88		Conspired with other PLAN participants to organize simultaneous clinic blockades around the country, resulting in 2,500 arrests	
Terry		Vestel, NY	Trespass; harassment of persons outside clinic and/or blockade	Yes (convicted)
Terry		Binghamton, NY/Southern Tier	Threatened clinic suppliers to persuade them not to supply products to clinics	
Terry		New York/ Southern Tier	Publicized possession of fetal remains	
Terry	7/84		Harassment of persons outside clinic and/or blockade	Yes, arrested for disorderly conduct
Terry	6/20/85		Trespass	Yes
Terry	1986	Binghamton, NY/Southern Tier Clinic	Clinic invasion	Unknown

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Terry	1986	Binghamton, NY	Demonstrated with 50 persons outside home and office of owner of Southern Tier clinic	Yes, including Terry
Terry	1986	North Dakota	Harassment of persons outside clinic and/or blockade	Unknown
Terry	1986	Binghamton, NY	Contacted landlords to threaten him to cancel lease with Southern Tier clinic	
Terry	1986	St. Louis, MO	Conspired to commit extortionate acts to close clinics	
Terry	1986	St. Louis, MO	Harassment of persons outside clinic and/or clinic blockade	Yes, including Terry
Terry	1/86	Binghamton, NY/Southern Tier Clinic	Trespass; resisting arrest	Two
Terry	1/86	New York/ Southern Tier	Harassment of persons outside clinic and/or blockade	
Terry	1/86	Binghamton, NY	Demonstration at home of Southern Tier clinic's landlord	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Terry	1/6/86	Binghamton, NY/Southern Tier	Clinic invasion, participants chained themselves to equipment, resisting arrest	Yes, including Terry
Terry	1/8/86		Harassment of persons outside clinic and/or blockade	Yes, arrested for disorderly conduct
Terry	1/30/86	New York/ Southern Tier	Clinic invasion, trespass	Yes, including Terry
Terry	3/26/86	Pensacola, FL	Clinic blockade by 50 persons	Six
Terry	4/10/86	St. Louis, MO/ Regency Park clinic	Clinic blockade	Yes, including Terry
Terry	4/19/86	St. Louis, MO/ Reproductive Health Center	Harassment of persons outside clinic and/or blockade	Yes
Terry	4/25/86	Binghamton, NY/Southern Tier Clinic	Twelve people locked themselves in three rooms in clinic	Unknown
Terry	6/5/86	Binghamton, NY/Southern Tier Women's Services	Clinic blockade	Unknown
Terry	11/14-11/17/86	Washington, D.C.	Harassment of persons outside clinic and/or blockade	300 including Terry, arrested for incommoding

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Terry	11/28/86	Pensacola, FL/ Ladies Center	Harassment of persons outside clinic and/or blockade	Seven
Terry	3/87	Binghamton, NY	Residential demonstration by 50-60 persons, including Scheidler	Unknown
Terry	4/30/87-5/2/87	Atlanta, GA	Conspired with others at PLAN convention to close clinics through extortionate acts, including blockades in Atlanta in May 1987	
Terry	4/29/87	Chamblee, GA/ Northside Women's Center	Clinic blockade	Unknown
Terry	5/2/87	Atlanta, GA/ Women's Health Center	Clinic blockade, resisting arrest	79, including Terry
Terry	8/21/87	Washington, D.C.	Conspired with other members of PLAN leadership council to close clinics through extortionate acts	
Terry	11/27/87	Cherry Hill, N.J./Cherry Hill Women's Center	Harassment of persons outside clinic and/or blockade	200

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Terry	11/28/87	Cherry Hill, N.J./Cherry Hill Women's Center	Clinic blockade	Unknown
Terry	1988	Atlanta, GA	Trespass; resisting arrest	135
Terry	before 5/2/88		Conspired to and organized week-long of New York clinics	
Terry	5/2/88	New York City/ Herbert Schwartz clinic	Clinic blockade by 700-800 persons	Yes, including Scheidler, Terry
Terry	5/2/88	New York/ Southern Tier	Blocked clinic with vehicles	1,647
Terry	5/5/88	Long Island, NY/Women's Gynecological Center	Clinic blockade	401
Terry	5/6/88	New York City/ Herbert Schwartz Office	Clinic blockade	Yes, including Terry
Terry	7/5/88	Philadelphia, PA/Northeast Womens' Center	Clinic blockade	Yes, including Terry

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Terry	7/6/88	Philadelphia, PA/Northeast Womens' Center	Clinic blockade	Unknown
Terry	before 7/19/88		Organized clinic blockade of 7/19/88	
Terry	7/19/88	Atlanta, GA/ Surgicenter	Clinic blockade by over 1,200 persons	More than 1,200
Terry	8/25-27/88	Chicago, IL	Conspired with others at PLAN conference to close clinics through extortionate acts, including blockades at two clinics on 8/27/88; Terry featured as speaker	
Terry	10/88		Conspired with other PLAN participants in organizing simultaneous clinic blockades around the country, resulting in 2,500 arrests	
Terry	1989	46 Cities	Harassment of persons outside clinics and/or blockades; resisting arrest	3,000
Terry	1/22/89	New York City/ Planned Parenthood	Clinic blockade	300

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Terry	1/23/89	New York City/ Planned Parenthood	Clinic blockade	200
Terry	3/2/89	Boca Raton, FL	Blockade of office of doctor who performed abortions at clinic	40 to 50, including Terry
Terry	3/89	Los Angeles, CA/Dr. Allred's Clinic	Clinic blockade by 450 persons	Unknown
Terry	3/11/89	Chico, CA/ Feminist Health Center	Clinic blockade	300
Terry	3/23/89	Cyprus, CA	Clinic blockade	Yes, including Terry
Terry	3/24/89	Los Angeles, CA/Family Planning	Clinic blockade	Yes, including Terry
Terry	4/1/89	West Hartford, CT/ Summit Women's Center	Clinic invasion and blockade	61
Terry	4/2/89	Boca Raton, FL	Clinic blockade by 40-50 persons, including Terry	Unknown
Terry	6/12/89	Summit Hartford, CT/ Summit Women's Center	Clinic invasion and blockade	261

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Terry	4/2/90	Boca Raton, FL	Clinic blockade	Yes, including Terry
Terry	4/2/90	Ft. Lauderdale, FL	Clinic blockade	Yes, including Terry

CO-CONSPIRATORS

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Advocates for Life	2/15/85	Portland, OR/ Feminist's Women's Health Center	Harassment of persons outside clinic and/or blockade in contempt of court order	Yes, includ. Andrews, Ryan
Joan Andrews	11/82			
Joan Andrews	2/22/85	St. Louis, MO/ Reproductive Health Services	Clinic blockade and invasion Andrews broke through window	Yes
Joan Andrews	2/23/85	St. Louis, MO/ Regency Park Clinic	Clinic blockade and invasion	Yes
Joan Andrews	3/25/86	Pensacola, FL	Clinic blockade; participants impeded passage of ambulance; Conspired with Scheidler and others to and did train others to harass persons outside clinic and/or blockade and/or invade clinic	Unknown

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Joan Andrews	3/26/86	Pensacola, FL/ Ladies Center	Clinic invasion; destroyed equipment and supplies	Arrested for burglary, criminal mischief, resisting arrest (convicted)
Joan Andrews	4/19/86	St. Louis, MO/ Regency Park Clinic	Clinic blockade	Yes, 107 arrests including Terry, Scholberg, Andrews
Don Benny Anderson	5/82	St. Petersburg, FL Women's Health Center	Firebombed clinic	Yes (convicted of bombing)
Don Benny Anderson	5/82	Clearwater/ Bread and Roses Clinic	Arson	Yes (convicted of arson)
Don Benny Anderson	6/82	Fairfax, VA/ Medical Center	Bombing	Unknown
Don Benny Anderson	8/82	Granite City, IL/Tri-City Obstetrics Center	Kidnapping of Dr. & Mrs. Hector Zevallos	Yes (convicted [U.S. v. Anderson, 716 F.2d 446 (7th Cir. 1983)])
Jeff Arendt	1988	Northbrook, IL	Conspired with Migliorino to take fetal remains from Vital-Med during non-business hours	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Curtis Beseda	12/83	Everett, WA/ Feminist Health Center	Firebombed clinic	Yes (convicted)
Curtis Beseda	3/84	Bellingham, WA/Bellingham Family Practice	Firebombed clinic	Yes (convicted)
Curtis Beseda	3/84	Everett, WA/ Feminist Health Center	Arson	Yes (convicted)
Curtis Beseda	4/84	Everett, WA/ Feminist Health Center	Firebombed clinic	Yes (convicted)
Wendell Brane	4/21/89	Ft. Wayne, IN/ Women's Health Organization	Clinic blockade	100
Wendell Brane	6/10/89	Ft. Wayne, IN/ Women's Health Organization	Clinic blockage	135
Wendell Brane	8/25/89	Ft. Wayne, IN/ Women's Health Organization	Clinic blockage	175
Michael Bray	1/84	Dover, DE/ Reproductive Care Center	Arson	Yes (convicted of conspiracy)
Michael Bray	2/84	Norfolk, VA/ Hillcrest	Bombing	Yes (convicted)

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Michael Bray	2/84	Hyattsville, MD/Prince George's	Arson	Yes (convicted)
Michael Bray	2/84	College Park	Arson	Unknown
Michael Bray	7/84	Annapolis, MD/ Planned Parenthood	Bombing	Yes (convicted of conspiracy)
Michael Bray	7/84	Washington, D.C./National Abortion Federation Offices	Bombing	Unknown
Michael Bray	11/84	Washington, D.C./ACLU Office	Bombing	Unknown
Michael Bray	11/84	Rockville, MD/ Planned Parenthood	Bombing	Yes (convicted)
Michael Bray	11/84	Wheaton, MD/ Metro Women's Clinic	Bombing	Yes (convicted)
Michael Bray	12/84	Suitland, MD/ Metro Family Planning	Bombing	Yes (convicted of conspiracy)
Michael Bray	1/85	Washington, D.C./Hillcrest Surgi-Center	Bombing	Yes (convicted of conspiracy)

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Michael Bray	3/86	Baton Rouge, LA/Acadian Women's Center	Attempted arson	Yes (convicted of conspiracy)
Bryan Brown	4/21/89	Ft. Wayne, IN/ Women's Health Organization	Clinic blockage	100
Bryan Brown	6/10/89	Ft. Wayne, IN/ Women's Health Organization	Clinic blockage	135
Bryan Brown	8/25/89	Ft. Wayne, IN/ Women's Health Organization	Clinic blockage	175
Ellen Brown	4/21/89	Ft. Wayne, IN/ Women's Health Organization	Clinic blockage	100
Ellen Brown	6/10/89	Ft. Wayne, IN/ Women's Health Organization	Clinic blockage	135
Ellen Brown	8/25/89	Ft. Wayne, IN/ Women's Health Organization	Clinic blockage	175
Peter Burkin	1980	Hempstead, NY/ Bill Baird clinic	Arson	Yes (convicted)
Andrew Burnett	2/5/85	Portland, OR/ Feminist Women's Health Center	Clinic blockage; participants impeded passage of ambulance	Unknown

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Andrew Burnett	3/26/86	Pensacola, FL/Ladies Center	Clinic blockade	Yes, including Burnett
Andrew Burnett	4/30/87-5/2/87	Atlanta, GA/	Conspired with others at PLAN mini-conference to close clinics through extortionate acts	
Andrew Burnett	8/21/87	Washington, D.C.	Conspired with other members of PLAN leadership council to close clinics through extortionate acts	
John Burt	1985		Publicized possession of fetal remains	
John Burt	3/25/86	Pensacola, FL/	Conspired with Scheidler and others to invade Ladies Center clinic	
John Burt	3/26/86	Pensacola, FL/ Ladies Center	Clinic invasion; struck clinic administrator and NOW officer	Arrested for Burglary, criminal mischief, battery, resisting arrest
Sarah Burt	Around 3/27/86	Pensacola, FL/ Ladies Center	Clinic invasion	Yes, including Burt; arrested for burglary, criminal mischief, resisting arrest

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Carl Cenera	12/85	New York City/ Manhattan Women's Center	Bombing	Yes
Charles Cheshire	3/85	Baton Rouge, LA/Delta Women's Clinic West	Attempted arson	Yes (convicted of conspiracy)
Charles Cheshire	10/85	Baton Rouge, LA/Delta Women's Center	Firebombing	Yes (convicted of conspiracy)
Charles Cheshire	10/85	Baton Rouge, LA/ River City Women's Center	Arson	Unknown
Charles Cheshire	3/86	Baton Rouge, LA/Acadian Women's Center	Attempted arson	Yes (convicted of conspiracy)
Citizens for Life	3/8/86	Milwaukee, WI/ Bread and Roses	Clinic invasion; members handcuffed themselves to medical equipment	Unknown
Citizens for Life	5/10/86	Milwaukee, WI/ Women's Health Organization	Clinic invasion by 30 persons; member handcuffed himself to doorknob in hallway containing medical equipment	Unknown
Citizens for Life	10/6/86	Milwaukee, WI/ Bread and Roses	7 members blockaded clinic; 2 handcuffed themselves to the clinic's moving van	One

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Citizens for Life	1987	Milwaukee, WI	Helped coordinate clinic blockade held in Detroit, MI	
Citizens for Life	1/10/87	Milwaukee, WI/ Affiliated Medical Services	Invaded and blockaded clinic; 2 members handcuffed themselves to chairs in the waiting room	Unknown
Citizens for Life	10/10/87	Milwaukee, WI/ Metropolitan	Members chained clinic doors shut, blocked doors with cars	Unknown
Citizens for Life	4/23/88	Milwaukee, WI/ Bread and Roses	Members chained clinic doors shut, blocked doors with cars	Nine
Citizens for Life	09/88	Milwaukee, WI	Members wrote harassing letters to Summit landlord Joe Zilber	
Citizens for Life	1988	Milwaukee, WI	Co-sponsored publicity of possession of fetal remains taken from Vital-Med	
Citizens for Life	2/15/89	Milwaukee, WI/Bread and Roses	Members blocked clinic doors with cars	unknown
Micki Conti	around 3/27/86	Pensacola, FL	Organized demonstration to occur at home Dr. Lucero (of Ladies Center) in Mobile, AL	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Oren Cooper	4/24/89	Chicago, IL/ American Women's Medical Group	Harassment of persons outside clinic and/or blockade	Yes
Oren Cooper	10/14/89	Chicago, IL/ American Women's Medical Group	Harassment of persons outside clinic and/or blockade	Yes
Mary Dowdy	Around 3/27/86	Pensacola, FL/ Ladies Center	Clinic invasion	Arrested for trespass
Laura Armstrong Dunn	8/10/85	St. Louis, MO/ Regency Park Clinic	Clinic blockade	60 arrested for trespass
Laura Armstrong Dunn	9/14/85	St. Louis, MO/ Reproductive Health Services	Clinic blockade	Yes, arrested for trespass, including trespass
Eagle Forum	1988	Milwaukee, WI	Co-sponsored publicity of possession of fetal remains taken from Vital-Med	
Karisa Epperley	3/26/86	Pensacola, FL/ Ladies Center	Clinic invasion; destroyed equipment and supplies	Arrested for burglary
Feminists for Life/Milwaukee	1988	Milwaukee, WI	Co-sponsored publicity of possession of fetal remains taken from Vital-Med during non-business hours	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Greg Gesch	1988	Northbrook, IL	Conspired with and accompanied Migliorino to take fetal remains from Vital-Med during non-business hours	
Matthew Goldsby	6/84	Pensacola, FL/Ladies Center	Bombing	Arrested for Bombing
Matthew Goldsby	7/84	Pensacola, FL	Bombing	Unknown
Matthew Goldsby	12/84	Pensacola, FL/Women's Center	Bombing	Yes (convicted of bombing)
Matthew Goldsby	12/84	Pensacola, FL	Bombed doctor's office	Yes (convicted of bombing)
Joseph Grace	5/83	Norfolk, VA/ Hillcrest Clinic	Arson	Yes (convicted)
John Haring	3/26/86	Pensacola, FL/ Ladies Center	Trespass; resisting arrest	Yes
Sharon Henning		St. Louis, MO	Clinic invasion	Yes, including Henning
Sharon Henning	1/85	St. Louis, MO/ Reproductive Health Services	Clinic blockade by 50-100 persons	Yes, including Henning

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Sharon Henning	1/85	St. Louis, MO/ Reproductive Health Services	Clinic invasion	Unknown
Sharon Henning	1986	St. Louis, MO/ Regency Park clinic	Trespass, standing on front corner of car	Yes, including Henning
Sharon Henning	Spring 1986	St. Louis, MO/ Reproductive Health Services	Clinic blockade	Yes, including Henning
Sharon Henning	4/86	St. Louis, MO/ Regency Park Clinic	Clinic blockade	Yes, including Henning
Sharon Henning	1988	Paoli, PA	Clinic blockade by 500 persons, resisting arrest	Yes, including Henning
Sharon Henning	7/88	PA	Clinic blockade, resisting arrest	Yes, including Henning
Sharon Henning	8/88	Atlanta, GA	Clinic blockade by 100 persons, resisting arrest	Yes, including Henning
Sharon Henning	10/88	St. Louis, MO/ Reproductive Health Services	Harassment of persons outside clinic and/or blockade	Yes, including Henning

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Jerry Hiller	9-10/88	Milwaukee, WI	Met with Joel Lee, prospective Summit landlord, to interfere with lease agreement with Summit	
David Holman	5/86	Rockford, IL/ N. Illinois Women's Center	Attempted arson	Yes (convicted)
David Holman	10/86	Rockford, IL/ N. Illinois Women's Center	Arson	Yes (convicted)
David Holman	11/86	Rockford, IL/ N. Illinois Women's Center	Arson	Yes (convicted)
David Holman	12/86	Rockford, IL/ N. Illinois Women's Center	Attempted arson	Yes (convicted)
David Holman	1/87	Rockford, IL/ N. Illinois Women's Center	Arson	Yes (convicted)
Jerry Horn	6/16/84	Milwaukee, WI	Harassment of persons outside clinic and/or blockade	Yes
Jerry Horn	12/8/89	Chicago, IL	Clinic blockade by 25 persons; 2 cars blocked door of clinic	3 or 4 persons; arrested trespass or violation of city ordinance

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Jay Huddle	4/24/89	Chicago, IL/ American Women's Medical Group	Harassment of persons outside clinic and/or blockade	Yes
Jay Huddle	10/14/89	Chicago, IL/ American Women's Medical Group	Harassment of persons outside clinic and/or blockade	Yes
Chet Kilgore	1988	Northbrook, IL	Conspired with and accompanied Migliorino to take fetal remains from Vital-Med during non-business hours	
William Lanning	4/85	Granite City, IL/Hope Clinic	Attempted arson	Convicted
Sam Lee	1980	Anaheim, CA	Conspired to firebomb and invade clinics	Unknown
Sam Lee	1982	University City, MO/ Ladies Center	Harassment of persons outside clinic and/or blockade	Yes, including Lee, O'Brien
Sam Lee	11/82	Outside clinic	Harassment of persons outside clinic and/or blockade in contempt of court order	Yes, including Andrews, Ryan
Sam Lee	1985	St. Louis, MO	Clinic blockade	Yes

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Sam Lee	1/5/85	St. Louis, MO/ Euclid Ave. clinic	Harassment of persons outside clinic and/or blockade	Yes, including Lee
Sam Lee	9/14/85	St. Louis, MO/ Reproductive Health Services	Clinic blockade	Yes, arrested for trespass, including Scheidler
Sam Lee	4/86	St. Louis, MO	Harassment of persons outside clinic and/or blockade	Yes, including Lee
Sam Lee	4/19/86	St. Louis, MO/ Regency Park clinic	Harassment of persons outside clinic and/or blockade	107, including Lee
Sam Lee	5/86	St. Louis, MO/ Ladies Center	Clinic invasion	Yes, including Lee, Ryan
Sam Lee	6/86	Denver, CO/ Planned Parenthood	Harassment of persons outside clinic and/or blockade by 20 persons	Yes, including Lee
Peter Lennox	12/14/86	St. Louis, MO	Conspired with others at PLAN mini-conference to close clinics through extortionate acts	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Peter Lennox	4/30/87-5/2/87	Atlanta, GA	Conspired with others at PLAN conference to close clinics through extortionate acts; Lennox featured as speaker	
Peter Lennox	8/21/87	Washington, D.C.	Conspired with other members of PLAN leadership council to close clinics through extortionate acts	
Lesniewski	7/27/87	Chicago, IL/ American Women's Medical Group	Harassment of persons outside clinic and/or blockade; pushed and attacked clinic personnel	Unknown
Lesniewski	12/12/87	Chicago, IL/ American Women's Medical Group	Harassment of persons outside clinic and/or blockade; drove into clinic security guard	Yes (convicted of criminal trespass)
Lutherans for Life	1988	Milwaukee, WI	Co-sponsored publicity of possession of fetal remains taken from Vital-Med	
Edmund Miller	1988	Northbrook, IL	Conspired with and accompanied Migliorino to take fetuses from Vital-Med during non-business hours	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Edmund Miller	1988	Milwaukee, WI	Conspired to ship fetal remains taken from Vital-Med to the other cities so local co-conspirators could publicize their possession of the remains	
Edmund Miller	early August 1988	Tallahassee, FL	Transported 729 fetuses taken from Vital-Med so local co-conspirators could publicize their possession of the remains	
Edmund Miller	1988	Milwaukee, WI	Conspired to publicize possession of fetal remains taken from Vital-Med	
Edmund Miller	1988	Philadelphia, PA	Transported fetal remains removed from Vital-Med to Philadelphia so local co-conspirators could publicize their possession of the remains	
Ann O'Brien	1982	University City, MO/ Ladies Center	Harassment of persons outside clinic and/or blockade	Unknown
Ann O'Brien	11/82		Harassment of persons outside clinic and/or blockage in violation of court order	Yes, including O'Brien, Andrews, Ryan

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Ann O'Brien	1984	Bridgeton, MO	Clinic invasion, violated injunction	Yes, including O'Brien
Ann O'Brien	1985		Conspired to engage in harassment of persons outside clinics and/or clinic blockades	
Ann O'Brien	6/85	Washington, D.C.	Harassment of persons outside clinic and/or blockade	Yes, including O'Brien
Ann O'Brien	9/14/85	St. Louis, MO/ Reproductive Health Services	Clinic blockade	Yes, including O'Brien, Scheidler
Ann O'Brien	1986	St. Louis, MO/ Ladies Center	Harassment of persons by 10-25 people outside clinic and/or blockade	Yes, including O'Brien
Ann O'Brien	1986	St. Louis, MO/ Reproductive Health Services	Clinic blockades	
Ann O'Brien	3/29/86	St. Louis, MO/ Regency Park clinic	Trespass	Yes, including O'Brien
Ann O'Brien	5/86	St. Louis, MO/ Ladies Center	Clinic invasion	Yes, including O'Brien, Ryan, Lee

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Ann O'Brien	6/86	Denver, CO/ Planned Parenthood	Harassment of persons outside clinic and/or blockade by 20 persons	Yes, including O'Brien
Ann O'Brien	8/9/86 9/20/86 10/4/86 12/4/86 12/5/86	St. Louis, MO/ Regency Park clinic	Clinic blockades	Yes, including O'Brien
Ann O'Brien	3/87	St. Louis, MO/ Womenscare	Trespass	Yes, including O'Brien
Ann O'Brien	3/7/87	St. Louis, MO/ Reproductive Health Services	Trespass	Yes, including O'Brien
Ann O'Brien	4/29/87	Chamblee, GA/ Northside Women's Center	Trespass	Yes, including O'Brien
Ann O'Brien	5/9/87	St. Louis, MO/ Reproductive Health Services	Trespass	Yes, including O'Brien

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Ann O'Brien	5/23/87	St. Louis, MO/ Reproductive Health Services	Trespass	Yes, including O'Brien
Ann O'Brien	7/11/87 7/25/87 10/87 11/87	St. Louis, MO/ Regency Park clinic	Trespass	Yes, including O'Brien
Ann O'Brien	9/87	New Orleans, LA/Metaire	Clinic blockade	Arrested for trespassing
Ann O'Brien	10/10/87	St. Louis, MO/ Regency Park clinic	Clinic blockade	Yes, including O'Brien
Ann O'Brien	10/29/87	St. Louis, MO/ Reproductive Health Services	Trespass	Yes, including O'Brien
Ann O'Brien	11/7/87	St. Louis, MO/ Reproductive Health Services	Trespass	Yes, including O'Brien
Ann O'Brien	12/9/87	St. Louis, MO/ Reproductive Health Services	Trespass	Yes, including O'Brien

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Ann O'Brien	1/88	St. Louis, MO/ Regency Park clinic	Trespass	Yes, including O'Brien
Ann O'Brien	3/12/88	St. Louis, MO	Clinic blockade	Yes, including O'Brien
Ann O'Brien	4/88	St. Louis, MO/ Reproductive Health Services	Trespass	Yes, including O'Brien
Ann O'Brien	4/9/88	St. Louis, MO/ Regency Park clinic	Trespass	Yes, including O'Brien
Ann O'Brien	4/16/88	St. Louis, MO/ Regency Park clinic	Trespass	Yes, including O'Brien
Ann O'Brien	5/2-6/88	New York City	Clinic blockades	Unknown
Ann O'Brien	7/88	Philadelphia, PA	Trespass	Yes, including O'Brien
Ann O'Brien	7/5/88	Paoli, PA	Trespass	Yes, including O'Brien
Ann O'Brien	7/19/88	Atlanta, GA	Trespass	Yes, including O'Brien
Ann O'Brien	1/89	Washington, D.C.	Harassment of persons outside clinics and/or blockade	Yes, including O'Brien

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Ann O'Brien	2/3/89	St. Louis, MO/ Regency Park clinic	Trespass	Yes, including O'Brien
Ann O'Brien	2/4/89	St. Louis, MO/ Reproductive Health Services	Violation of injunction	Yes, including O'Brien
Ann O'Brien	2/25/89	St. Louis, MO/ Regency Park clinic	Trespass	Yes, including O'Brien
Ann O'Brien	4/89	St. Louis, MO/ Regency Park clinic	Trespass	Yes, including O'Brien
Ann O'Brien	8/89	Columbia, MO	Harassment of persons outside clinic and/or blockade	Yes, including O'Brien
Ann O'Brien	8/89	St. Louis, MO/ Regency Park clinic	Trespass	Yes, including O'Brien
Ann O'Brien	9/89	St. Louis, MO/ Regency Park clinic	Trespass	Yes, including O'Brien
Ann O'Brien	11/11/89	St. Louis, MO/ Regency Park clinic	Trespass	Yes, including O'Brien

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Ann O'Brien	12/89	Columbia, MO	Harassment of persons outside clinic and/or blockade	13, including O'Brien
Lucy O'Keefe	8/24/88	Raleigh, N.C.	Conspired to publicize possession of fetal remains taken from Vital-Med during non-business hours and received U.P.S. shipment of the remains	
Brian Pabich	1988	Northbrook, IL	Took fetal remains from Vital-Med during non-business hours	
Fred Patz	9-10/88	Milwaukee, WI	Met with Joel Lee, prospective Summit landlord, to interfere with lease agreement with Summit clinic	
PDAL	1984	Bridgeton, MO	Clinic invasion, violated injunction	Yes
PDAL	6/10-12/84	Kansas City, MO	"Kansas City Agreement" formulated: resolution never to gather in any major city without holding anti-abortion activity aimed at closing local abortion centers	
PDAL	1985	Unspecified	Meeting to explain how to sit-in	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
PDAL	1985	St. Louis, MO/ Reproductive Health Services	Trespass	Yes
PDAL	4/85	Appleton, WI	Conspired and formed agenda with others at PLAN conference for clinic invasions	
PDAL	6/85	Washington, D.C.	Harassment of persons outside clinic and/or blockades	Yes, arrested for incommoding
PDAL	1986	University City, MO/ Ladies Center	Clinic blockade	Yes
PDAL	1/86	Washington, D.C.	Clinic invasion	Yes, including Ryan
PDAL	1/22/86	Washington D.C./Greater Washington Health Center	Clinic invasion; harassment of persons outside clinic and/or blockade; tampering with clinic equipment	Yes
PDAL	3/25/86	Pensacola, FL	Conspired with Scheidler, Andrews, Burt and others train others to harass persons outside clinic and/or blockade and/or invade Ladies Center clinic	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
PDAL	3/26/86	Pensacola, FL/Ladies Center	Clinic blockade by 50 persons; clinic invasion resulting in destruction of property	Six, including Burt, Andrews
PDAL	3/29/86	St. Louis, MO/ Regency Park clinic	Trespass	Yes, including Ryan
PDAL	4/86	St. Louis, MO	Hosted PLAN conference where defendants and others conspired to close clinics through extortionate acts, including clinic blockades on 4/19/86, in June, August and December, 1986 and January and April 1987 in connection with PLAN conference	
PDAL	4/19/86	St. Louis, MO/ Regency Park	Clinic blockade	107
PDAL	6/86	Denver, CO/ Planned Parenthood	Clinic blockade	Yes, including Ryan

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
PDAL	8/9/86 9/20/86 10/4/86 12/4/86 12/5/86	St. Louis, MO/ Regency Park clinic	Clinic blockades	Yes, including Ryan
PDAL	3/87	St. Louis, MO/ Womenscare	Trespass	Yes
PDAL	3/7/87	St. Louis, MO/ Reproductive Health Services	Trespass	Yes
PDAL	4/29/87	Chamblee, GA/ Northside Women's Center	Trespass	Yes, including Ryan
PDAL	4/30/87- 5/2/87	Atlanta, GA	Conspired with others at PLAN conference to close clinics through extortionate acts; including blockades at Atlanta clinics in May 1987	
PDAL	5/2/87	Atlanta, GA/ Women's Health Center	Clinic blockade	79

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
PDAL	5/9/87	St. Louis, MO/ Reproductive Health Services	Trespass	Yes
PDAL	5/23/87	St. Louis, MO/ Reproductive Health Services	Trespass	Yes
PDAL	7/11/87	St. Louis, MO/ Regency Park clinic	Trespass	Yes
PDAL	7/25/87	St. Louis, MO/ Regency Park clinic	Trespass	Yes
PDAL	9/87	New Orleans, LA/Metaire	Clinic blockade	Yes
PDAL	10/87	St. Louis, MO/ Regency Park clinic	Trespass	Yes
PDAL	10/10/87	St. Louis, MO/ Regency Park clinic	Clinic blockade	Unknown
PDAL	11/87	St. Louis, MO/ Regency Park clinic	Trespass	Yes

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
PDAL	11/7/87	St. Louis, MO/ Reproductive Health Services	Trespass	Yes
PDAL	11/21/87	St. Louis, MO/ Regency Park clinic	Clinic blockade	Yes
PDAL	11/27/87	Cherry Hill, NJ/ Cherry Hill Women's Center	Harassment of persons outside clinic and/or blockade	Yes
PDAL	12/9/87	St. Louis, MO/ Reproductive Health Services	Trespass	Yes
PDAL	12/19/87	St. Louis, MO/ Regency Park clinic	Clinic blockade	Unknown
PDAL	1/88	St. Louis, MO/ Regency Park clinic	Trespass	Yes
PDAL	1/23/88	St. Louis, MO/ Regency Park clinic	Clinic blockade	Unknown

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
PDAL	3/12/88	St. Louis, MO/ Reproductive Health Services	Trespass	Yes
PDAL	4/88	St. Louis, MO/ Reproductive Health Services	Trespass	Yes
PDAL	4/9/88	St. Louis, MO/ Regency Park clinic	Trespass	Yes
PDAL	4/16/88	St. Louis, MO/ Regency Park clinic	Trespass	Yes
PDAL	5/2-6/88	New York City	Clinic blockades	Yes
PDAL	7/88	Philadelphia, PA	Trespass	Yes
PDAL	7/5/88	Paoli, PA	Trespass	Yes
PDAL	7/19/88	Atlanta, GA	Trespass	Yes
PDAL	10/88		Conspired with other PLAN participants to organize simultaneous clinic blockades around the country, resulting in 2,500 arrests	2,500

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
PDAL	10/29/88	St. Louis, MO/ Reproductive Health Services	Trespass	
PDAL	11/6/88	St. Louis, MO/ Regency Park clinic	Clinic blockade	Unknown
PDAL	1/89	Washington, D.C.	Harassment of persons outside clinic and/or blockade	Yes; arrested for incommoding
PDAL	2/3/89	St. Louis, MO/ Regency Park clinic	Trespass	Yes
PDAL	2/4/89	St. Louis, MO/ Reproductive Health Services	Violation of injunction	Yes
PDAL	2/25/89	St. Louis, MO/ Regency Park	Trespass	Yes
PDAL	4/89	St. Louis, MO/ Regency Park	Trespass	Yes, including O'Brien
PDAL	8/89	St. Louis, MO/ Regency Park	Trespass	Yes, including O'Brien

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
PDAL	9/89	St. Louis, MO/ Regency Park	Trespass	Yes, including O'Brien
PDAL	11/11/89	St. Louis, MO/ Regency Park	Trespass	Yes, including O'Brien
Beatrice Penovich	1988	Northbrook, IL	Conspired to and aided and abetted transportation of fetal remains taken from Vital-Med during non-business hours	
Marjorie Reed	1985	Toledo, OH	Residential demonstrations at house of Dr. Armstrong (of Toledo Medical Services)	Unknown
Marjorie Reed	1985	Toledo, OH	Residential demonstrations at home of Dr. Kiji (of Toledo Medical Services)	Unknown
Marjorie Reed	8/85	Toledo, OH/ Toledo Medical Services	Arson resulting in $30,000 in damage to clinic procedure room	Yes (convicted)
Marjorie Reed	12/85	Toledo, OH/ Toledo Medical Services	Arson resulting in 420,000 in damage to clinic	Yes (convicted)

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Marjorie Reed	1986	Toledo, OH	Residential demonstrations at home of Dr. Armstrong	Unknown
Marjorie Reed	1986	Toledo, OH	Residential demonstrations at home of Dr. Kiji	Unknown
Marjorie Reed	5/86	Toledo, OH/ Center for Choice	Arson resulting in $200,000 in damage - total destruction of clinic	Yes (convicted)
Marjorie Reed	3/87	Toledo, OH/ Toledo Medical Services	Attempted arson	Unknown
Marjorie Reed	6/87	Toledo OH/ Toledo Medical Services	Arson resulting in $1,000 in damage to clinic	Yes (convicted)
Marjorie Reed	9/19/87	Detroit, MI	Clinic blockade	Yes, including Reed
Carol Robbins	1988	Northbrook, IL	Conspired with and accompanied Migliorino to take fetal remains from Vital-Med during non-business hours	
John Ryan		St. Louis, MO/ Regency Park	Clinic blockade	Yes, including Ryan
John Ryan		St. Louis, MO/ Womenscare	Clinic invasion	Yes, including Ryan

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
John Ryan		St. Louis, MO/ Reproductive Health Services	Clinic blockade	Yes, including Ryan
John Ryan		St. Louis, MO/ Reproductive Health Services	Trespass	Yes, including Ryan
John Ryan		St. Louis, MO/ Regency Park clinic	Clinic invasion	Yes, including Ryan
John Ryan		St. Louis, MO/ Regency Park clinic	Trespass	Yes, including Ryan
John Ryan	11/82		Harassment of persons outside of clinic and/or blockade in violation of court order	Yes, including Ryan, Andrews
John Ryan	1983	University City, MO/ Ladies Center	Clinic blockade, violation of court order	Yes, including Ryan
John Ryan	1984	Bridgetown, MO	Violation of court order	Yes, including Ryan

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
John Ryan	6/10-12/84	Kansas City, MO	"Kansas City Agreement" formulated: resolution never to gather in any major city without holding anti-abortion activity aimed at closing down local abortion centers	
John Ryan	1985	University City, MO/ Ladies Center	Clinic invasion	Yes, including Ryan
John Ryan	4/11/85	Appleton, WI	Conspired and formed agenda with others at PLAN Conference for clinic invasions; pledged to create "a year of pain and fear" for those performing or receiving abortions	
John Ryan	8/10/85	St. Louis, MO/ Regency Park Clinic	Clinic blockade	Yes, over 60, including Scholberg, Andrews
John Ryan	1986	Denver, CO/ Planned Parenthood	Clinic blockade	Yes
John Ryan	1986	St. Louis, MO Escobedo clinic	Clinic invasion	Yes, including Ryan

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
John Ryan	3/25/86	Pensacola, FL	Conspired to and did train others to harass persons outside clinic and/or blockade and/or invade Ladies Center with Scheidler and others	
John Ryan	3/26/86	Pensacola, FL/Ladies Center	Clinic blockade by 50 persons; clinic invasion resulting in destruction of clinic equipment	Six, including Burt, Andrews
John Ryan	4/86	St. Louis, MO/ Regency Park clinic	Clinic blockade	Yes, including Ryan
John Ryan	4/86	St. Louis, MO	Conspired with others at PLAN Conference to close clinics through extortionate acts, including blockades on 4/19/86, in June, August and December 1986 and January and April 1987	
John Ryan	4/19/86	St. Louis, MO/ Regency Park clinic	Clinic blockade	107
John Ryan	5/7/86	St. Louis, MO/ Ladies Center	Clinic invasion	Unknown

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
John Ryan	5/30/86	University Center, MO/ Ladies Center	Attempted to invade clinic	Unknown
John Ryan	6/12-14/86	Denver, CO/ Rocky Mountain Planned Parenthood	Harassment of persons outside clinic and/or blockade	Yes, including Ryan
John Ryan	11/28/86	Pensacola, FL/Ladies Center	Harassment of persons outside clinic and/or blockade by several hundred persons	Steven
John Ryan	12/14/86	St. Louis, MO	Conspired with others at PLAN mini-conference to close clinics through extortionate acts	
John Ryan	1987	Cape Girardeau, MO/ Women's Health Center	Clinic invasion	Yes, including Ryan
John Ryan	4/29/87	Chamblee, GA/ Northside Women's Center	Clinic blockade	Yes, including Ryan, O'Brien
John Ryan	4/30/87-5/2/87	Atlanta, GA	Conspired with others at PLAN conference to close clinics through extortionate acts; Ryan featured as speaker	

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
John Ryan	5/2/87	Atlanta, GA/Women's Health Center	Clinic blockade	79
John Ryan	8/21/87	Washington, D.C.	Conspired with other members of PLAN leadership council to close clinics through extortionate acts	
John Ryan	1/89	Washington D.C.	Clinic invasion	Yes, including Ryan
Sandy Schultz	1988	Milwaukee, WI	Stored 500 fetal remains taken from Vital-Med during non-business hours	
James Simmons	6/84	Pensacola, FL/ Ladies Center	Bombing	Arrested for Bombing
James Simmons	7/84	Pensacola, FL	Bombing	Unknown
James Simmons	12/84	Pensacola, FL/ Ladies Center	Bombing	Yes (convicted)
James Simmons	12/84	Pensacola, FL	Bombed doctor's office	Yes (convicted of bombing)
Kathren Simmons	6/84	Pensacola, FL/ Ladies Center	Bombing	Yes (convicted of conspiracy)
Kathren Simmons	7/84	Pensacola, FL	Bombing	Unknown

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Kathren Simmons	12/84	Pensacola, FL/ Ladies Center	Bombing	Yes (convicted of conspiracy)
Kathren Simmons	12/84	Pensacola, FL/	Bombed doctor's office	Yes (convicted of conspiracy)
Norman Stone	7/6/84	Appleton, WI/ Fox Valley Clinic	Paraded fetal remains on a blanket in front of clinic	Yes
Don Teshman	1988	Tallahassee, FL	Publicized possession of fetal remains taken from Vital-Med	
Unidentified Vital-Med Employee	1988	Northbrook, IL	Aided and abetted removal of fetal remains from Vital-Med	
Kay Wiggins	6/84	Pensacola, FL/ Ladies Center	Bombing	Yes (convicted of conspiracy)
Kay Wiggins	12/84	Pensacola, FL/ Ladies Center	Bombing	Yes (convicted of conspiracy)
Kay Wiggins	12/84	Pensacola, FL	Bombed doctor's office	Yes (convicted of conspiracy)

CO-CONSPIRATOR	DATE	PLACE	EVENTS	ARRESTS
Wisconsin Right to Life/ Milwaukee chapters	1988	Milwaukee, WI	Co-sponsored publicity of possession of fetal remains taken from Vital-Med	
Conrad Wojnar		Chicago, IL/ Grand Ave. clinic	Harassment of persons outside clinic on several occasions	Unknown
Conrad Wojnar	5/11/85	Chicago, IL/ Albany Women's Medical Center	Harassment of persons outside clinic by 50 persons; clinic invasion	15, arrested for disorderly conduct
Conrad Wojnar	10/11/85	Chicago, IL/ 1130 S. Michigan Ave. clinic	Harassment of persons outside clinic	7
Conrad Wojnar	1988	Chicago, IL/ Albany clinic	Harassment of persons outside clinic	Unknown
Conrad Wojnar	2-3/88	Chicago, IL	Conspired with Murphy for removal of fetal remains from Vital-Med during non-business hours	
Conrad Wojnar	2-3/88	Chicago, IL	Stored fetal remains taken from Vital-Med during non-business hours at Wojnar's home	

Supreme Court, U.S.
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No. 92-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

v.

JOSEPH M. SCHEIDLER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONERS

Of Counsel:

LOWELL E. SACHNOFF, ESQ.
JACK L. BLOCK, ESQ.
JUDI A. LAMBLE, ESQ.
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000

ALAN M. POLLACK, ESQ.
MITCHELL G. MANDELL
SCOTT A. SOMMER
POLLACK & GREENE
757 Third Avenue
New York, New York 10017
(212) 421-5300

FAY CLAYTON, ESQ.
Counsel of Record
SUSAN VALENTINE, ESQ.
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

Counsel for the Petitioners

PETITION FOR CERTIORARI FILED NOVEMBER 2, 1992
CERTIORARI GRANTED JUNE 14, 1993

QUESTION PRESENTED FOR REVIEW

Whether the courts should create an unwritten requirement limiting RICO to cases where either the enterprise or the racketeering activity has an overriding economic motive?

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

In addition to the respondent listed in the caption, respondents include Randall A. Terry; Andrew Scholberg; Timothy Murphy; Monica Migliorino; Pro-Life Action League, Inc.; Project Life; and Operation Rescue.

The parent company of petitioners Delaware Women's Health Organization, Inc. and Summit Women's Health Organization, Inc. is Women's Health Organization, Inc. The National Organization for Women, Inc. has no parent or subsidiary companies.

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No. 92-780
In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

v.

JOSEPH M. SCHEIDLER, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 968 F.2d 612 (7th Cir. 1992), and is reproduced as Appendix A to the Petition for Writ of Certiorari (the "Petition"). The opinion of the District Court for the Northern District of Illinois, dismissing this lawsuit, is reported at 765 F.Supp. 937 (N.D. Ill. 1991), and is reproduced as Appendix B to the Petition. The order denying the Petition for Rehearing is reproduced as Appendix G to the Petition.

STATEMENT OF JURISDICTION

This Court granted certiorari on June 14, 1993. Petitioners were granted an extension to file their brief on or before August 13, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1961(1)

"racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under

section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic); (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds); or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States[.]

18 U.S.C. § 1961(4)

"enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity[.]

18 U.S.C. § 1962(c)

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1964(c)

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

The Parties

This class action lawsuit was brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO") against a nationwide terrorist organization of

anti-abortion extremists who target reproductive health care clinics, staff and patients for violence and other criminal acts.[1] The extremists, along with their local and regional organizations, conduct and participate in the affairs of an enterprise, Pro-Life Action Network ("PLAN"), which coordinates the threats and acts of violence against these clinics nationwide.[2] J.A.100-101. PLAN's stated objective is to drive all clinics performing abortions out of business "by any and all means available." J.A.53 (¶53). These means include extortion through direct threats of personal harm to clinic personnel and patients; arson and fire-bombing; burglary and criminal damage to clinic property and equipment; and threats against the clinics'

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[1] The original complaint was brought under the antitrust laws against only four of the defendants (Scheidler, Ryan, Pro-Life Action League, Inc., ("PLAL") and Pro-Life Direct Action League, Inc.). Record ("R.")1. In 1989, after the Pro-Life Action Network had organized Operation Rescue, the complaint was amended to add RICO and state law tort claims, and additional defendants were joined. R.155. (A few of the defendants were named on only the antitrust, not the RICO, claims and thus are not respondents here.) Later that same year, a Second Amended Complaint was filed, omitting one of the named plaintiff clinics and adding an additional clinic as class representative. Joint Appendix ("J.A.") 39-80. In addition to the RICO claim under § 1962(c), a § 1962(a) claim was also raised in the amended complaints and dismissed below. However, plaintiffs did not seek a writ of certiorari on the § 1962(a) issues.

[2] PLAN is structured as a coalition of anti-abortion extremists and their locally-based organizations. It is comprised of defendants Scheidler, PLAL, Scholberg, Migliorino, Murphy, Terry, Operation Rescue, and Project Life, as well as other co-conspirators and participants who are not defendants in this suit. PLAN is the umbrella organization that incorporates the various "organized and violent mobs across the country" to which Justice Stevens referred in *Bray v. Alexandria Clinic*, ___ U.S. ___, 113 S.Ct. 753, 768 (1993) (Stevens, J., dissenting).

lessors, medical laboratories and suppliers. J.A.39-40(¶2); 118-197. In March of this year, a protest led by co-conspirator John Burt targeted a Pensacola clinic and Dr. David Gunn was murdered.[3]

The plaintiffs who bring this suit are clinics[4] that have been physically besieged by the defendants and their co-conspirators, J.A.41-42 (¶¶6-8); 45 (¶21); 46 (¶¶23-27); 50-51 (¶¶43-46); a class of women who have sought to use (or who may seek to use) the clinics' services, J.A.41(¶5); 45-46(¶22); and the National Organization for Women ("NOW"), which has a vital interest in women's rights to privacy and reproductive freedom. *Id.* As charged in the Second Amended Complaint, J.A.39-88, and RICO Case Statement, J.A.87-197, between 1980 and 1990, the defendants and their co-conspirators made public threats against every women's health clinic in the nation that performs abortions and against their staffs and patients. The defendants organized and carried out mob actions including no fewer than:

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[3] Burt is a co-conspirator who, with defendant Scheidler, committed assaults and vandalized another Pensacola clinic in March, 1986. *See* J.A.50 (¶¶ 41-42); J.A.165. Defendant Operation Rescue circulated "Wanted" posters with Dr. Gunn's picture on them. After the murder, Scheidler commented: "I have to admit that some good came out of it; Doctors are going to be more difficult to get." *Chicago Tribune*, May 12, 1993, p. 1.

[4] Two representative clinics bring this suit on behalf of all clinics similarly situated. J.A.45 (¶ 21). Although the plaintiffs promptly moved for class certification under Rule 23, Fed. R. Civ. P., R.61, and renewed that motion from time to time, *e.g.*, R.297, at the defendants' insistence, *e.g.*, R.73, the class certification issue was deferred indefinitely by the District Court. R.76.

- 73 invasions or "blitzes" of class member clinics;
- 311 physical blockades;
- 23 acts of arson and attempted arson;
- 33 fire bombings and attempted fire bombings;
- 11 acts of destruction of clinic equipment and property;
- 8 assaults and batteries upon clinic staff and personnel;
- 84 acts of harassment;
- 383 acts of trespass on private clinic property;
- 25 burglaries and thefts; and
- 7 extortionate acts of interference with clinics' leases and other contractual relations.

J.A.87-197. In addition, the defendants stole and exploited more than 4,000 fetuses sent by interstate mail to an Illinois laboratory for pathology testing, and threatened to disclose publicly the identities of the women who conceived the fetuses. J.A.57 (¶¶64-78), 69-70 (¶¶97(j), 98(l)).

The individual defendants have been arrested repeatedly. J.A.39-80; 118-160. While many of the predicate acts have resulted in criminal charges and convictions, J.A.47 (¶¶32); 51 (¶46); 118-197, a large number of the defendants' mob actions have so overburdened the local law enforcement and judicial

systems that their terrorism has gone undeterred. *Id.*[5] The defendants have routinely ignored injunctions entered against them. *See* J.A.93-95.

The Enterprise and the Predicate Acts

PLAN is a highly-organized nationwide network of anti-abortion extremists; its member organizations include defendants PLAL and Operation Rescue. J.A.44 (¶¶17-19); 100. The executive directors of these member organizations[6] serve on PLAN's "steering committee" or "leadership council." J.A.100-102. PLAN is responsible for the overall national strategy of what it calls "direct action" against clinics, clinic staff and patients; PLAN's activities include multi-city "blitzes," national organizing conferences and training sessions, and the adoption of national agendas. J.A. 48-55 (¶¶38-55); 100-102. At its 1985 annual conference, PLAN designated 1985-1986 as "the year of pain and fear" for anyone giving or receiving an abortion. J.A.49 (¶40). PLAN conference participants were greeted with a marquee at the conference site that said, "Have a Blast," and participants wore firecrackers, symbolizing dynamite, on their lapel labels. J.A.49 (¶40).

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[5] As examples, the July 19, 1988, Atlanta blockades resulted in approximately 1,200 arrests, J.A.56 (¶ 61); 157, and the May 2, 1988, blockade in Binghamton resulted in 1,647 arrests. J.A.156. Since the Complaint was last amended, over 2,700 were arrested in Wichita in 1991 and 600 in Buffalo, New York, in 1992.

[6] Defendant Scheidler founded and heads PLAL; defendant Terry founded and directs Operation Rescue.

The participants in the enterprise have committed criminal acts directly against clinics, their staff and patients. J.A.44 (¶¶17-19); 47-57 (¶¶28-63); 99-106. They claim that they "cannot wait for the legislative and judicial process that will make abortion illegal. The activist has to save lives now." Scheidler, J., *Closed: 99 Ways to Stop Abortion*, p. 17 (R.30 Ex. A); J.A.47 (¶28). They have proclaimed, "No abortion clinic will be spared." J.A.53-54 (¶53).[7] They refer to this direct interference with the operation of clinics that provide abortions and with the efforts of women to obtain those services as "direct action," a term that forms part of PLAL's name.

Defendants Migliorino, Murphy, Scheidler, Scholberg and Terry are well-known anti-abortion extremists who conduct the affairs of PLAN. They have publicly and repeatedly stated their intention to close down abortion clinics nationwide. *See, e.g.*, J.A.42-43 (¶¶9-15). Through a well-organized telecommunications network, PLAN mobilizes participants to assemble in sufficient numbers to carry out its terrorist acts and disrupt the operations of specific clinics for periods of up to many weeks. J.A.46-47 (¶27); 68-69 (¶98(i)); 108-109.

Under the direction of a designated leader, an assemblage of extremists typically blocks access to clinics, invades them and harasses and attacks their personnel and patients. *E.g.*, J.A.50 (¶¶41-42); 97-98. Frequently the group engages in direct attacks on the clinics' operations in some other way, such as destroying medical equipment; pouring glue into locks of clinic doors so they cannot open;

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[7] Plaintiffs do not suggest that defendants' speech or writing is illegal, but cite it as an admission of their criminal intent to violate the law and, specifically, to commit the predicate acts charged here.

locking participants' heads to the door of a clinic to prevent it from opening, J.A.50 (¶42); 54-55 (¶55); kidnaping clinic doctors, or disabling doctors' cars, J.A.161. The recent murder of Dr. Gunn demonstrates the extremes to which the enterprise's recruits will go to make real their threats.

At least once a year for the past several years, conspiracy leaders have orchestrated and carried out a "national day of rescue" to blockade selected clinics across the country simultaneously. J.A.56-57 (¶62); 69 (¶98(i)(4)); 100-102; 118-159.[8] Typically, only the top leadership of the enterprise knows before the last moment which clinics will be targeted so as to minimize the ability of local police to protect the clinics and their staff and patients. *See* J.A.106.

Interstate Commerce

PLAN members raise hundreds of thousands of dollars annually for their criminal activity and spend substantial sums on interstate telephone calls and postage to organize their crimes, not to mention salaries and expenses for the leaders and "consultants" (including the individual defendants) who travel throughout the country conducting workshops on "direct action" and leading the terrorist campaigns. J.A.48-49 (¶38); 55-57 (¶¶58-63).

The PLAN enterprise has a serious impact on interstate commerce aside from its own substantial expenditures. When a clinic is under siege, women are denied access not

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[8] On October 29, 1988, the National Day of Rescue spanned 40 cities and resulted in nearly 2,500 arrests. J.A.56-57 (¶62).

only to abortion services but also to routine gynecological health care, such as breast cancer screening, pap tests, contraceptive counseling, birth control products, fertility counseling and treatment, and gynecological education. *E.g.*, J.A.41-42 (¶¶6, 7). The patients of the class-member clinics frequently travel interstate to obtain reproductive health care services, including abortion, J.A.45-46 (¶¶21-24); 108-109, and the crimes of the enterprise directly interfere with their ability to obtain these services.

Injury to Business and Property

As a result of defendants' predicate acts of racketeering, clinics have been driven out of business; their businesses have been interrupted; their property has been destroyed; they have been forced to incur increased security costs and higher insurance premiums; they have had to cope with the harassment of personnel, vendors and landlords; and they have lost substantial revenues. J.A. 60-62 (¶¶76-78); 63 (¶¶86-87); 63-72 (¶¶89-105); 112-113. The defendants' blockades, property destruction and physical violence have caused a number of clinic employees, including doctors, to resign their positions out of fear of further injury by these extremists; and employee productivity at clinics has, of course, decreased. J.A.50-51 (¶44); 66 (¶97). Repairs to damaged buildings and the replacement of equipment and supplies destroyed by the conspirators have added to the clinics' damages. The increased operating costs imposed on the clinics by the defendants' crimes have diminisned clinics' profits and have caused clinics to pass on some of these costs to their patients in the form of higher prices. J.A.63 (¶¶87-89). Patients of the targeted clinics have also suffered from threats and acts of physical assault and harassment by the

defendants. Patients have been deprived of access to medical services; and they have paid the inevitable increase in prices for clinic services. J.A.63-64 (¶¶91); 66 (¶97). Because the enterprise operates nationwide, each class-member clinic faces the constant threat that if it continues its business, its doctors, staff and patients may be the next victims of these violent and destructive acts.

Economic Benefits Derived By the Defendants

The predicate acts through which PLAN operates have produced substantial amounts of money for the individual defendants and the enterprise. In 1989 alone, Operation Rescue (which is no more than a business name for Terry individually) reported income of more than $777,000. J.A. 104-105. As early as 1986, PLAL's income was over $100,000, and PLAL director Scheidler received a $45,000 salary plus "perks" like a company car and travel reimbursements. J.A.71-72 (¶¶100-104); 103. PLAN's "consultants" receive stipends of up to $800 per week. J.A.105. Among the enterprise's sources of revenue are commercial sales of training materials explaining how to close abortion clinics and evade law enforcement authorities. Additional money to fund PLAN's activities comes from contributions, which rise in direct proportion to the intensity of the uproar and damage caused by the enterprise's tactics. J.A.108. One of the defendants, Project Life, operates anti-choice clinics that directly compete with the plaintiff clinics in reproductive services and counseling.

Proceedings Below

Despite these well-pled facts, the District Court dismissed the complaint under Rule 12(b)(6), Fed. R. Civ. P.; the Seventh Circuit "reluctantly affirm[ed]" that dismissal,[9] holding "RICO requires either an economically motivated enterprise or economically motivated predicate acts." Pet. A-2.[10]

SUMMARY OF ARGUMENT

The economic motive requirement that the Seventh Circuit imposed on § 1962(c) finds no support in the text of RICO. The creation of this non-textual requirement contravenes Congress's directive that RICO is to be interpreted broadly. Examination of the Organized Crime Control Act ("OCCA"), of which RICO is a part, underscores the breadth of RICO's provisions by revealing

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[9] The Seventh Circuit described the defendants' deeds as "reprehensible conduct," Pet. A-17, and acknowledged the District Court's finding (made in the course of denying one of the defendants' Rule 11 motions) that "the defendants, in particular Scheidler, have links with arsonists who have fire-bombed health centers." Pet. A-3 n.5. (References to the Appendices to the Petition are cited "Pet. A-___" and "Pet. B-___.") The court also recognized that the conduct charged in the complaint is "otherwise-criminal" and "directed at destroying all health centers performing abortions." Pet. A-19.

[10] At the same time that it dismissed the RICO claims, the District Court dismissed the antitrust claim on the grounds that the defendants' conduct was not "commercial." The Seventh Circuit affirmed that dismissal as well, but this Court limited its grant of *certiorari* to the RICO issue.

the contrast between RICO and other, more limited portions of the OCCA.

While there is no need to look beyond RICO's plain and unambiguous text, the legislative history of RICO supports its plain language. Congress expressly rejected versions of the bill that would have limited RICO to profit-seeking enterprises or to predicate acts motivated by financial concerns.

For more than a decade, this Court has rebuffed lower courts' attempts to engraft unwritten requirements onto RICO. This Court's decisions underscore the impropriety of imposing limitations not found in the definitions of "enterprise" and "racketeering activity." Congress defined the terms "enterprise" and "racketeering activity" clearly and precisely, avoiding any need to look for hidden meanings in them or to judicially amend the terms, as the lower courts did.

The economic motive requirement that the Seventh Circuit has imposed is vague, uncertain and problematic. It would invite the weighing of subjective racial, religious, political, psychological and social motivations that have no place in RICO cases. Such a requirement would severely hamper the effectiveness of RICO, render already complex cases unmanageable and impose tremendous burdens on the courts.

In enacting RICO, the economic elements that concerned Congress were the *effect* of concerted criminal conduct on businesses and interstate commerce, not the motives of the perpetrators of criminal acts. In this case, there is no question that the defendants' highly-organized, nationwide campaign of terrorism against clinics that

perform abortions has injured the business and property of these clinics and their patients. This is the only economic requirement that RICO imposes.

However, if the Court were to open the Pandora's box of economic motives, there are ample facts contained in the Complaint and RICO Case Statement to permit NOW and the clinics to proceed with discovery and trial. The well-pled facts show that the defendants' motives include the desire for the substantial economic benefits that they receive from their wrongful conduct. Most of the defendants had low-paying jobs before being elevated into positions in the enterprise that compensate them lucratively. The defendants' unlawful work is done for money, and most of the defendants have no business outside their employment by the enterprise or its member organizations.

The defendants and their enterprise profit from their acts of violence, and they have hidden portions of the proceeds received in support of their violent crimes to keep these assets safe from court fines and civil judgments. This in itself indicates economic motive. The defendants and their enterprise have other economic aspects, as well, for they operate with all the accoutrements of profit-seeking businesses, including budgets, employees, staff and modern equipment.

The lower court dismissed this case on a Rule 12(b)(6) motion. While there is no principled or practical reason to enmesh the courts in an inquiry about motives, if the Court were to affirm the Seventh Circuit's economic motive requirement, NOW and the clinics should be given the opportunity to prove that it has been satisfied. The complaint alleged economic purposes and benefits that

should not have been ignored when the lower court created this requirement.

ARGUMENT

I.
NEUTRAL PRINCIPLES OF STATUTORY CONSTRUCTION FORBID THE ADDITION OF AN UNWRITTEN "ECONOMIC MOTIVE" LIMITATION TO RICO

The text with which we are concerned provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). The statute does not say a word about economic motive. Nonetheless, the Seventh Circuit dismissed the complaint on a Rule 12(b)(6) motion, holding that an economic motive is required for a § 1962(c) claim. In reaching this conclusion, the Seventh Circuit added to the statute a requirement that simply is not there; in doing so, it violated the most basic rules of statutory construction.

A. The Text of RICO Shows that An Economic Motive is *Not* Required

1. The Plain Language of the Statute is the First and Best Indication of Its Meaning

In interpreting a statute, this Court has consistently stressed that "'we look first to its language,'" *Reves v. Ernst & Young*, ___ U.S. ___, 113 S.Ct. 1163, 1169 (1993), citing *United States v. Turkette*, 452 U.S. 576, 580 (1981). Courts "must presume that a legislature says in a statute what it means and means in a statute what it says there....When the words of a statute are unambiguous, then this first canon [of statutory construction] is also the last: judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, ___ U.S. ___, 112 S.Ct. 1146, 1149 (1992).[11] The Court attempts to enforce the purpose behind the legislation, and "[t]here is...no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *see also I.N.S. v. Cordoza-Fonseca*, 480 U.S. 421, 431 (1987).[12]

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[11] In *West Virginia University Hospitals, Inc. v. Casey*, ___ U.S. ___, 111 S.Ct. 1138, 1147 (1991), the Court declared that the best evidence of the purpose of a statute is the "statutory text adopted by both Houses of Congress and submitted to the President....Where [the text] contains a phrase that is unambiguous -- that has a clearly accepted meaning in both legislative and judicial practice -- we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process."

[12] Justice Scalia has often insisted that the text of a statute is the *only* proper source for determining its meaning.

(continued...)

Members of this Court have long warned against judicial lawmaking in the guise of interpreting statutes. *See, e.g.*, Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Columbia L. Rev. 527, 533-34 (1947). When the Court interprets a statute that Congress has drafted broadly, that breadth should be honored.[13] *E.g.*, *Russello v. United States*, 464 U.S. 16, 21-22 (1983) (rejecting a narrow interpretation that would have redefined "interest" in RICO to mean "interest *in the enterprise*"); *see also Sedima, S.P.R.L., v. Imrex Co., Inc.*, 473 U.S. 479 (1985) (refusing to add "prior-conviction" or "racketeering injury" requirements to RICO). It is not the courts' proper role to impose unwritten limitations on a statute that Congress has drafted broadly. *See, e.g.*, *Gollust v. Mendell*, ___ U.S. ___, 111 S.Ct. 2173, 2178 (1991) (contrasting narrowly-drawn provisions of securities act with other broad terms in the statute and refusing to engraft any conditions that Congress did not see fit to impose).

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[12] (...continued)

> It is our task...not to enter the minds of the Members of Congress -- who need have nothing in mind in order for their votes to be both lawful and effective -- but rather to give fair and reasonable meaning to the text of the United States Code....

Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1989) (Scalia, J., concurring); *see also I.N.S. v. Cordoza-Fonseca*, 480 U.S. at 452-54 (Scalia, J., concurring) (courts are not free to replace the language of a law with an "unenacted legislative intent").

[13] Judicial activism in interpreting statutes is particularly inappropriate when a statute is of recent origin and its text is detailed. *See* Eskridge, *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479, 1496-97 (1979).

When a statute is unambiguous, its text ends the inquiry, for it is a time-honored rule that legislative history will not be used to find an ambiguity when one does not appear in the text of the statute itself. *Wisconsin Railroad Commission v. Chicago, Burlington & Quincey R.R.*, 257 U.S. 563, 589 (1922) (legislative history is "only admissible to solve doubt, not to create it"); *see also Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise....") (citation omitted).

The Court has said that "[t]he responsibility for the justice or wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws." *United States v. First Nat'l Bank*, 234 U.S. 245, 260 (1914) (citations omitted). In interpreting statutes, courts must exercise caution to "avoid the usurpation" of the legislature's law-making power. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). "[W]renching from the words of a statute a meaning which they literally did not bear" brings a court too close to the boundary between the judicial and legislative powers; even if a law is thought to be unwise, overly broad or "otherwise objectionable," the proper place to remedy it is "with the law making authority, and not with the courts." *Id.* at 60; *see also Sedima*, 473 U.S. at 499 ("this defect -- if defect if is -- is inherent in the statute as written, and its correction must lie with Congress.").

2. This Court Has Recognized RICO's Breadth and Rejected Non-Textual Limitations of RICO

Each time this Court has been faced with the task of determining the scope of RICO, it has followed the established principles of statutory construction, looking first at the plain language of the statute. *E.g.*, *Reves*, 113 S.Ct. at 1169; *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989); *Turkette*, 452 U.S. at 580. The Court has recognized that RICO is meant to be broad, not crabbed in its reach; Congress statutorily directed that RICO "be liberally construed to effectuate its remedial purposes." Pub. L. 91-452, § 904(a), 84 Stat. 947, (1970) 91st Cong. 2d Sess., reprinted in 1970 U.S.C.C.A.N. 1104; note following 18 U.S.C. § 1961. *See, e.g.*, *Turkette*, 492 U.S. at 249 (noting RICO's "'self-consciously expansive language and overall approach'"); *Sedima*, 473 U.S. at 498 (acknowledging Congress's "express admonition" to construe RICO liberally). The Court has emphasized that RICO was not meant to have a "pinched construction." *H.J.*, 492 U.S. at 249. In drafting RICO, Congress chose words that convey "concepts of breadth." *Russello*, 464 U.S. at 21.

Section 1962(c), under which this case is brought, makes no mention of motive, economic or otherwise. (The only arguably "economic" aspect of § 1962(c) is the jurisdictional requirement that the enterprise affect interstate commerce.) Nonetheless, the lower courts held that RICO requires that either the enterprise or the predicate acts have an economic motive.[14] Pet. A-2, A-32. The Seventh

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[14] In requiring an economic motive, the Seventh Circuit relied heavily on *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983). (continued...)

Circuit did not -- and could not -- cite any portion of the statute where this requirement appears. We submit that the court tacitly conceded the lack of any statutory authority when it held that an economic motive in *either* the enterprise *or* the predicate acts of racketeering would satisfy the court's requirement: the enterprise need not be economically motivated (as long as the predicate acts are), and the predicate acts need not be economically motivated (as long as the enterprise is).

Quoting one of its earlier decisions, the Seventh Circuit said, "'[W]e do not think the general principles of RICO can be used to stretch § 1962(c) to reach this situation in the face of the subsection's own limits.'" Pet. A-31. Yet, the Seventh Circuit gave no hint as to which "limits" it was referring, since it made no reference to any limiting word or phrase in § 1962(c), or anywhere else for that matter. The court said it was adopting the "economic motive" requirement as a way of "merely fleshing out the definition of [RICO's] elements," Pet. A-32, but never specified the "elements" it was supposedly "fleshing out." The court also failed to explain why terms that were already defined in § 1961 required further definition.

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[14] (...continued)
However, *Ivic* was based largely on the Second Circuit's concern with "prosecutorial zeal" and the expansive use of RICO, *id.* at 65, a concern that this Court soundly rejected when it reversed another decision of the Second Circuit in *Sedima*, 473 U.S. 479, two years later.

3. RICO Makes No Mention of Economic Motives

The plain language of § 1962(c) does not impose any "economic motive" requirement on the enterprise, the predicate acts or anything else. Furthermore, the statute's detailed definitions of "enterprise" and "racketeering activity" do not give even a hint that they require an "economic motive." In fact, the definitions prove the opposite. As this Court observed of RICO's "enterprise" definition,[15] "we...perceive no uncertainty in the meaning to be attributed to the phrase, 'any union or group of individuals associated in fact'...." *Turkette*, 452 U.S. at 581. The fact that RICO enterprises are not limited to "business" enterprises or profit-seeking enterprises is also established by the definition, which includes "*any*" individual, partnership, corporation, association, union, or "group of individuals associated in fact," with no reference to money or profits. *See* 18 U.S.C. § 1961(4).[16]

In addition to the lucid statutory definition of "enterprise" provided by Congress, common usage and understanding reinforce the breadth of the term. "Enterprise" encompasses any "venture, undertaking, project" or "any systematic purposeful activity or type of activity." *Webster's Third New International Dictionary*

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[15] Section 1961(4) provides:

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. . . .

[16] Unless otherwise indicated, emphasis in quoted material has been supplied.

757 (1971).[17] In its normal usage, "enterprise" includes virtually any type of organized venture. In *Russello*, 464 U.S. at 21, the Court emphasized how the term "enterprise" in RICO is a concept of breadth, and in *Turkette*, the Court, we thought, put any doubt about the breadth of the term "enterprise" firmly to rest:

> *There is no restriction upon the associations embraced by the definition*: an enterprise includes *any* union or group of individuals associated in fact.

452 U.S. at 580. The parallel between the lower court's view of enterprise and the view rejected by this Court in *Turkette* is striking. *Turkette* flatly refused to limit "enterprise" to "legitimate enterprises" because the language of the statute did not warrant such a restriction. *Id.* at 585. Likewise here, nothing in the statutory definition of "enterprise" suggests that a RICO enterprise must be an "economic" or "business" entity. There is no statutory limitation as to the enterprise's motive, purpose or goal. Had Congress chosen RICO to reach only "business" or profit-seeking enterprises, it easily could have narrowed the definition by inserting an extra word or two, such as "business" or "profit-seeking." *Cf. Turkette*, 452 U.S. at 580-81 (had Congress intended to exclude illegitimate enterprises from RICO, it could have added the word "legitimate" to the definition of enterprise). The plain

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[17] These broad definitions are consistent with the structure and common purpose required to make a RICO enterprise distinct from a pattern of racketeering activity. *See Turkette*, 452 U.S. at 583. *Turkette* explained that an enterprise is proved "by evidence of an ongoing organization, formal or informal," and "by evidence that the various associates function as a continuing unit." *Id.*

language of the statute should end the inquiry here: a RICO enterprise need not have an economic motive.

It is hard to imagine anything clearer than the definition of "racketeering activity" in RICO. Section 1961(1) states definitively what "'racketeering activity' *means*...," and defines racketeering activity as any act indictable under specified criminal statutes, including murder, kidnaping, arson, and extortion.[18] The criminal acts that constitute

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[18] Section 1961(1) provides:

> "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section

(continued...)

racketeering are not limited to crimes that are intrinsically economically motivated. In fact, three of the first four acts listed in § 1961(1) have no necessary relation to money at all: murder, kidnap and arson are crimes regardless of whether money is involved.[19] The clarity of the definition of racketeering activity contrasts with certain other definitions such as the description of what, at a minimum, a "pattern" of racketeering activity "requires." 18 U.S.C. §1961(5); *see H.J.*, 492 U.S. at 237. The definition of racketeering activity contains no ambiguity and leaves open no possibility that additional limitations may apply. Because the crimes that comprise racketeering activities do not require an economic motive -- and many of them do not intrinsically involve money at all -- it defies the statutory

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[18] (...continued)

> 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States[.]

[19] Many of the other predicate acts specified in § 1961(1) have no intrinsic relationship to money, either, *e.g.*, obstruction of justice, § 1503.

language to limit racketeering activity to acts that are motivated by money.

B. The Structure of OCCA and Its Subpart, RICO, Also Shows that Economic Motive Is Not an Element of a RICO Offense

1. While Other Parts of OCCA Limit Their Coverage to "Business Enterprises," RICO Does Not

Expanding the textual analysis beyond the provisions of § 1962(c) to examine the statute of which RICO is a part underscores the fact that RICO does not require an economic motive. This Court has held that the presence of limiting language in one section of a statute and its absence in another demonstrates Congress's intention to limit the reach of one section but not the other, *e.g.*, *Russello*, 464 U.S. at 23. An analysis of the Organized Crime Control Act of 1970 ("OCCA"), of which RICO is one title, shows that while other portions of the statute are limited to profit-seeking ventures, RICO is not.[20]

Congress's choice of the term "enterprise" in RICO contrasts with other less inclusive terms used elsewhere in OCCA. For example, 18 U.S.C. § 2516(1)(c) authorizes interception of electronic communications that may provide evidence of, *inter alia*, "*business* enterprises of gambling." *See also* 18 U.S.C. § 842, making it unlawful to engage in the unlicensed *business* of importing explosives. Section

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[20] RICO is Title IX of OCCA.

1961(4), by contrast, does not limit RICO to "business enterprises" and expressly includes "associations in fact," which need not be legal entities at all, much less "business" entities. When Congress wants to limit the enterprises within the statute's scope, it knows how to do so. It imposed no such limit on RICO.

2. The Structure of RICO's Subsections Demonstrates the Breadth of § 1962(c)

The structural analysis offered by the Seventh Circuit to justify requiring that a RICO enterprise have an economic motive actually proves the opposite. In reaching its conclusion that § 1962(c) requires an economic motive, the Court relied on *Ivic* and reasoned that, first, because § 1962(a) requires the "investment of income" into the enterprise and § 1962(b) requires the defendant to acquire an "interest in or control of" the enterprise, the enterprise must be "an organized profit-seeking venture." Pet. A-28.[21] Next, it reasoned that Congress must have intended

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[21] Title 18 U.S.C. § 1962(a) provides in relevant part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity ... to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce....

Title 18 U.S.C. § 1962(b) provides:

(continued...)

that an "enterprise" subject to § 1962(c) be capable of violating subsections (a) and (b). Therefore, the Seventh Circuit concluded, all RICO enterprises must be profit-seeking. Pet. A-28. The Seventh Circuit's analysis is flawed in several respects.

First, its initial premise is incorrect: while § 1962(a) prohibits the investment of racketeering income in an enterprise, it does not require that the *enterprise* be economically motivated, much less "profit-seeking." For example, income from predicate acts could easily be invested to establish and operate a non-profit-seeking enterprise designed to start race wars in our country, to punish those who oppose Croatian independence, to blow up public buildings and tunnels in Manhattan, or to fulfill the goals of a militant sect that believes Armageddon has come. Section 1962(a) puts no restriction on the type of enterprise into which the income may be invested, and it is all too obvious that most not-for-profit organizations require the investment of some money, just like profit-seeking organizations.[22]

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[21] (...continued)

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

[22] In the briefs filed in the Seventh Circuit, defendant Migliorino conceded the economic nature of such entities, saying, "the realities of political activism requires [sic] the realistic expenditure of money, generation of budgets, the making of fund-raising appeals, and the (continued...)

Likewise, the prohibition in § 1962(b) against acquiring or maintaining an interest in, or control of, an enterprise through a pattern of racketeering activity is not restricted to profit-seeking ventures. It plainly prohibits taking over a legitimate charity (such as a church) through a pattern of racketeering, and it prohibits controlling an illegitimate enterprise through such a pattern as well. For example, one may maintain control of a terrorist organization by leading its militant band on criminal rampages regardless of whether the organization issues stock or pays taxes. There is simply nothing in §§ 1962(a) or (b) that limits an enterprise subject to those prohibitions to "profit-seeking" entities in which one may hold a "property" interest.[23]

But even if the "investment of money" requirement of § 1962(a) and the "interest in or control of" requirement of § 1962(b) were properly viewed as limitations on the type of enterprise subject to those subsections, the lack of any such requirement in § 1962(c) only underscores the fact that § 1962(c) is not so limited. The "investment in" and "interest in or control of" requirements are not part of the definition of "enterprise," which applies to all of RICO, *see* § 1961(4); they are elements of §§ 1962(a) and (b). It is the "investment" requirement of § 1962(a) that supplies the economic element there, and the "interest in or control of" requirement of § 1962(b) that (arguably, albeit improbably)

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[22] (...continued)
incurring of operational costs." Brief at 16. *See also* Migliorino's Brief in Opposition to Petition for Writ of Certiorari, at 13.

[23] *See also* Cook, *Businessmen with Halos*, 146 *Forbes* 100 (Nov. 26, 1990) (discussing how non-profit organizations that accumulate surplus funds typically disburse such funds to their employees in the form of salaries and perks like travel allowances, low-interest loans and posh quarters).

adds a financial dimension there. These elements are conspicuously absent from § 1962(c) and from the definition of "enterprise" in § 1961(4). The presence of economic limits in subsections (a) and (b) and the absence of such limits in subsection (c) shows Congress's intent that subsection (c) reach more broadly.

The proposed text of RICO that made its way through Congress also shows that Congress added § 1962(c) to broaden the original bill; the earlier version contained only predecessors of §§ 1962(a) and (b). *Compare* S. 1861 (1969) *with* S. 1623, 91st Cong., 1st Sess. § 2 (1969). Section 1962(c) unquestionably reaches illegitimate criminal enterprises, like PLAN, regardless of whether their structures allow formal "investments" in them. *See Russello*, 464 U.S. at 24. Even if the Seventh Circuit were right in concluding that §§ 1962(a) and (b) are limited to profit-seeking entities, § 1962(c) -- which does not require either the investment of money or the maintenance of an interest in or control of the enterprise -- is not so limited. *Cf. Turkette*, 452 U.S. at 584 (rejecting lower court's premise that if §§ 1962(a) and (b) were limited to *legitimate* enterprises, § 1962(c) would have to be similarly limited).

3. The Only "Economic" Requirement in RICO is Economic Effects

Although the text of RICO shows no concern for "economic motive," Congress did emphasize the requirement of economic *effects*. In drafting RICO, Congress's chief concern was with the *effects* of organized criminality on the nation's economy. Such crime "drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption"

and "weaken[s] the stability of the Nation's economic system,...seriously burden[s] interstate and foreign commerce, threaten[s] the domestic security, and undermine[s] the general welfare of the Nation and its citizens[.]" Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922 (1970), 91st Cong., 2d Sess., reprinted in 1970 U.S.C.C.A.N. 1073. As one sponsor of the original RICO bill, S. 1623, stated:

> The proper functioning of a free economy requires that economic decisions be made by persons free to exercise their own judgment. *Force or fear limits choice, ultimately reduces quality, and increases prices.*

115 Cong. Rec. 6993 (1969).

Congress's concern with the *effects* of racketeering activities -- not the motivations -- is evident in RICO's text and structure.[24] First, § 1962(c) applies only to

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[24] Even the Second Circuit, which purported to discover the economic motive requirement in *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983), recognized a few months later in *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983), that it was the *effect* on the national economy that defined conduct actionable under RICO:

> Whether appellants extorted money for the long-term political purpose of effecting the separation of Croatia from Yugoslavia, whether this formed part, but not all, of their "motivation," or whether the freedom of their former province is an issue they care about not at all, the *effect* of their activities on the national economy is

(continued...)

enterprises "engaged in, or the activities of which *affect, interstate or foreign commerce.*" 18 U.S.C. § 1962(c). The concern with economic effects is also reflected in § 1964(c), which provides that only a person "injured in [its] *business or property* by reason of a violation of section 1962" may sue. 18 U.S.C. § 1964(c). These are the only "economic" requirements that are true to the text and structure of § 1962(c) and that reflect Congress's concerns with criminal conduct that interferes with the nation's economy. In contrast, RICO contains no expression of concern with the motivations, purposes or goals of the criminals who organize or carry out the criminal acts.

There is no question that PLAN is a highly-organized enterprise engaged in interstate commerce. J.A.65 (¶95), 71(¶99). Even the lower court acknowledged the extensive injury to business and property that NOW and the clinics have suffered from the defendants' predicate crimes. Pet. A-34-35. *See also* J.A.72 (¶¶104-05).[25] In short, the

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[24] (...continued)

> identical. The *Ivic* court described RICO as a device to prevent (and reverse) "the drain[ing of] billions of dollars from America's economy by unlawful conduct...." This effect is accomplished whatever considerations compel the creation and execution of an extortion scheme.

706 F.2d at 54 (citation omitted).

[25] After acknowledging how the defendants' crimes increased the plaintiffs' costs of doing business, while at the same time raising funds for themselves, the court said, "we do not contest that the defendants' activities had an economic effect on the plaintiffs, we simply refuse to equate that effect with the economic motive required by *Ivic* and its progeny." A-33-34.

economic effects and threat to domestic security about which Congress expressed concern in enacting RICO have materialized in the nationwide pattern of organized criminal acts committed by these defendants and the mobs they lead. Through their violent acts of intimidation and destruction, the defendants have put women's health clinics out of business; obstructed the daily operations of clinics; prevented patients from obtaining reproductive health services; and multiplied insurance and security costs, laboratory fees, rents, and ultimately consumer costs. They have threatened, kidnaped and harassed clinic employees and doctors -- and worse. *E.g.*, J.A.50 (¶42); 50-51 (¶44); 54-55 (¶55); 56 (¶59); 66 (¶97); 72 (¶105); 76 (¶122); 77 (¶125). Their crimes have resulted in the limited choices and increased prices against which the RICO sponsors warned. These economic effects readily satisfy the "economic" requirements of this legislation.

The structure of OCCA, including RICO's emphasis on economic impact, not motives, confirms the breadth of RICO's text: it is not limited to economic crimes or enterprises.

C. The Legislative History of RICO Does Not Contradict the Plain Language of Its Text; In Fact, It Shows that RICO Extends to Entities and Crimes that Are Not "Profit-Seeking"

In this case, there is no uncertainty or ambiguity about "economic motive" in the text, and so there is no need to consult RICO's legislative history. But even if there were, the legislative history confirms the textual and structural analyses establishing that there is no economic motive requirement.

On the occasions when it consults legislative history, the Court looks to see if there is a *clearly expressed* legislative intent different from the words of the statute. *E.g.*, *I.N.S. v. Cordoza-Fonseca*, 480 U.S. at 432 n.12. In the absence of such a "'clearly expressed legislative intent to the contrary,'" the language of the statute itself is conclusive. *Turkette*, 452 U.S. at 580 (citation omitted). The presumption that the plain meaning of the language in a statute expresses legislative intent may be rebutted only in "rare and exceptional circumstances." *Ardestani v. I.N.S.*, ___ U.S. ___, 112 S.Ct. 515, 520 (1991) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

Over the years, various attempts have been made to persuade the courts to limit RICO to the litigants' concept of the conduct at which RICO was aimed. In response, this Court has declared in no uncertain terms that RICO means what it says. In *Sedima*, 473 U.S. at 499, for example, the Court laid to rest the notion that Congress intended RICO to apply only to the Mafia or traditional ideas of "organized crime." Even if it were true that organized criminality in profit-seeking enterprises were Congress's chief concern, because the statute is not limited to those enterprises, it is not for the courts to impose such a limitation. As Representative Poff, a sponsor of RICO, explained when answering critics who sought to limit RICO to the Mafia:

> It is true that there is no organized crime definition in many parts of the bill. This is, in part, because it is probably impossible precisely and definitively to define organized crime. But if it were possible, I ask my friend, would he not be the first to object that in criminal law we establish procedures which

> would be applicable only to a certain type of defendant?

116 Cong. Rec. 35, 204 (1970). This Court has observed that "Congress drafted RICO broadly enough to encompass a wide range of criminal activity...likely to attract a broad array of perpetrators...." *H.J.*, 492 U.S. at 248. Corrupt government officials and political or ideological terrorists, as much as Mafia kingpins, have been and should continue to be subject to the statute. The legislative history of RICO does not reveal any congressional intent that RICO should be limited to profit-seeking businesses or to criminals whose acts are driven by monetary concerns any more than it is limited to the Mafia.

The legislative evolution of RICO demonstrates Congress's intent that the statute cover both profit-seeking and non-profit-seeking ventures and acts. Congress had an opportunity to inject an economic motive requirement into RICO and chose not to do so: an earlier version of the bill would have limited RICO to "business enterprises." Instead, Congress enacted a statute containing the generic and broad term "enterprise," and defined that term omitting any reference to "business." *Compare* S. 1623, 91st Cong., 1st Sess. § 2 (1969) *with* 18 U.S.C. § 1961(4). Where Congress deletes limiting language from an earlier version of a bill prior to its enactment, it may be presumed that Congress intended the deletion. *Russello*, 464 U.S. at 23-24.[26] It must be assumed, therefore, that Congress

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[26] A further indication that Congress did not intend to include an economic motive requirement in RICO appears in the legislative history of proposed § 1962(e). That subsection would have provided: "A violation of the section shall be deemed to continue so long as the

(continued...)

omitted the "business enterprise" limitation because it wanted RICO to cover both enterprises that were businesses and those that were not. The Seventh Circuit ignored this legislative history when it claimed to find support for its "economic motive" requirement in Congress's "emphasis on business" in RICO, Pet. A-32, and when it assumed that the term "enterprise" "conveys a restriction to economic entities." Pet. A-31.

Congress's intent that RICO cover non-profit-seeking enterprises also appears in the statements of RICO-sponsor Senator McClellan, who expressed concern with racketeering *wherever* it may be found, including in charities, foundations, governmental agencies and other non-commercial entities. 116 Cong. Rec. 592, 601, 606 (1970) (Partial List of Entities in Which Organized Crime Has Been Active and comments of RICO sponsors on corruption of public officials, law enforcement officers, judges, and prosecutors).[27] RICO cannot be redrafted by the courts to cover only profit-seeking ventures where both the text of RICO and its legislative history show that it was meant to cover non-economic entities as well.

In defining "racketeering activity," Congress expressly included crimes that need not involve money, far less a

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[26] (...continued)
person who committed the violation continues to receive any benefit from this violation." S. 30, 91st Cong., 1st Sess. § 1962(e) (1969), reprinted in Senate Report, No. 617, 91st Cong., 1st Sess. 1-2 at 159. However, this provision too was deleted from the bill before enactment.

[27] Non-profit organizations are equally subject to the antitrust laws, on which RICO was modeled. *See Goldfarb v. Virginia State Bar Ass'n*, 421 U.S. 773, 786-87 (1975). (*Sedima*, 473 U.S. at 489-90, noted RICO's reliance on the antitrust laws.)

subjective profit-seeking "motive." Congress further evidenced its intention for RICO to reach non-economic crimes by rejecting an amendment that would have excluded from RICO's predicate acts certain forms of non-violent protest not undertaken for commercial gain.[28] S. 438, 101st Cong., 1st Sess., § 3(e). *See Flood v. Kuhn*, 407 U.S. 258, 283 (1972) (Congress's decision not to enact legislation was more than "mere Congressional silence and passivity"). It would be particularly inappropriate for the courts to impose the very requirement that Congress did not see fit to impose.

The text, the structure and legislative history of RICO all demonstrate that neither the enterprise nor predicate acts require an economic motive. In fact, most of the circuit courts of appeals have held defendants liable under RICO despite the absence of economically-motivated enterprises or predicate acts. *E.g.*, *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493

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[28] The relevant portion of Senate Bill 438, which Congress rejected, stated as follows:

> (e) For purposes of this chapter, the term "racketeering activity" shall not include participation in, or the organization nor support of, any non-violent demonstration, assembly, protest, rally or similar form of public speech undertaken *for reasons other than economic or commercial gain or advantage*, and no action may be maintained under this chapter based on such activities.

S. 438, 101st Cong., 1st Sess., § 3(e) (1989). As Congress declined to exclude *non-violent* predicate acts that lack a profit motive, Congress certainly would not exclude *violent* crimes not committed for money.

U.S. 901 (1989) (enterprise opposed to abortion; extortionate acts aimed at closing clinics); *United States v. Yarbrough*, 852 F.2d 1522 (9th Cir. 1988) (group dedicated to "direct action" against non-whites and non-Christians with goal of overthrowing government; predicate act of murder of Jewish radio talk show host); *United States v. Ellison*, 793 F.2d 942 (8th Cir. 1986), *cert. denied*, 488 U.S. 866 (1988) (white supremacist group committing arson against churches that had homosexual members and against Jewish community center); *United States v. Qaood*, 777 F.2d 1105, 1116 (6th Cir.), *cert. denied*, 475 U.S. 1098 (1985) (government office); *United States v. Bagaric*, 706 F.2d 42 (2d Cir. 1983) (Croatian nationalists); *United States v. Dickens*, 695 F.2d 765 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983) (Black Muslim group); *United States v. Altomare*, 625 F.2d 5, 7, n.7 (4th Cir. 1980) (prosecutor's office); *United States v. Grzywacz*, 603 F.2d 682, 687 (7th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980) (government officials).[29] *See also Feminist Women's Health Center v. Roberts*, No. C86-161, 1989 WL 56017 (W.D. Wash., May 5, 1989) (rejecting economic motive requirement for anti-abortion group that tried to close women's health clinic that performed abortions).

This Court has cautioned repeatedly against judicial revision of the statute and has held that any restrictions on RICO must come from Congress, not the courts. *H.J.*, 492 U.S. at 249 (rejecting "multiple criminal schemes" and "organized crime" requirements and stating: "rewriting

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[29] Justice Stevens has often urged the Court to refrain from overriding a decision that the lower courts have unanimously followed. *E.g.*, *McNally v. United States*, 483 U.S. 350, 376 (1987) (Stevens, J., dissenting).

[RICO] is a job for Congress, if it is so inclined, and not for this Court"); *Russello*, 464 U.S. 16 ("interest" requirement is not limited to "interest in the enterprise"); *Turkette*, 452 U.S. at 587 (holding that RICO is not limited to "legitimate enterprises" and stating: "the courts are without authority to restrict the application of the statute"). *See also Holmes v. Securities Investor Protection Corp.*, ___ U.S. ___, 112 S.Ct. 1311, 1323 (1992) (O'Connor, J., concurring) (RICO has no purchaser/seller standing requirement where predicate acts are securities law violations). Applying these principles here, the Seventh Circuit's decision creating an economic motive requirement for RICO must be reversed.

D. An "Economic Motive" Requirement Would Create a Litigation Nightmare

The Seventh Circuit's "economic motive" requirement is vague, not only in its failure to specify its source, but also in its failure to prescribe how much economic motive is required, and whether it must appear in the animating inner needs and emotions of the defendants, their means, their ultimate goal, or somewhere else. Moreover, the Seventh Circuit's economic motive requirement is internally inconsistent. It ignores the unmistakable economic motive of PLAN to impose enormous costs on the clinics and drive them out of business and instead focuses only on the supposed need for a profit-seeking "motive" by PLAN's criminal enterprise or actions.

One thing is clear, however, from the court's application of its requirement to this case. The Seventh Circuit's "economic motive" requirement demands a subjective and dangerous inquiry that is far more

problematic than the objective economic "dimension" required by the Second Circuit in *Bagaric*, 706 F.2d 42, and *United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985), which itself has no support in the statutory text, structure or legislative history of RICO.[30]

Bagaric, retreating from the motives-based inquiry in *Ivic*, limited its non-textual requirement to "some" *objectively*-determined "financial purpose" or "economic dimension" and correctly observed that nothing in RICO or the list of predicate criminal acts requires an inquiry into motives or purposes. 706 F.2d at 53, n.11. Even *Bagaric* recognized that RICO does not and should not demand an inquiry into something as subjective as "mens rea" or "motives" and expressed great discomfort with a "motive" requirement of any sort:

> We purposely highlight our use of the word "motivated." As the test makes clear, we are troubled by the notion, advanced by appellants, that the Government will be required to prove the animating or long-run objective of a RICO enterprise was economic, apparently to the exclusion of other, collateral "motives."

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[30] While an "economic" requirement occasionally appears in *dicta* in Eighth Circuit opinions, it seems to focus on objective "goals." *E.g.*, *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). *But see United States v. Clark*, 646 F.2d 1259, 1263 (8th Cir. 1981) (government agency can be an enterprise); *Ellison*, 793 F.2d 942 (organization with non-economic purpose that commits non-economic predicate acts is subject to RICO).

> *It is clear that § 1962 does not, by its terms, require proof of ultimate improper economic motive....*

706 F.2d at 53 n.11. A "motive" requirement, *Bagaric* explained, would unnecessarily "politicize" and "inflame" the case; it would allow the defendants "to inject peripheral political and religious considerations into the trial," to "patronize the jury and to add a distracting element of emotionalism to the proceedings"; and it "would authorize the admission of evidence of political beliefs, racial animosities, and family and blood feuds as justification for criminal acts." 706 F.2d at 54-55. If defendants were allowed to offer their "good motives" as a defense to their illegal conduct, the battle over motives could dominate discovery and trial. *Id.*[31]

The Seventh Circuit's economic motive requirement entails all these problems and more. Because the court acknowledged the well-pled facts concerning the vast sums of money the defendants and their enterprise have derived from their crimes, it is clear that some objective economic dimension is not enough to satisfy the Seventh Circuit's standard. Instead, it appears that the Seventh Circuit requires that the ultimate or overriding subjective

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[31] In the antitrust context, the courts have repeatedly observed how unnecessary and burdensome a "motives" inquiry would be to the orderly progress of a case through discovery and trial. *See N.C.A.A. v. Board of Regents*, 468 U.S. 85, 101 n.23 (1984) ("good motives will not validate an otherwise anticompetitive practice."); *Federal Trade Commission v. Superior Court Trial Lawyers' Ass'n*, 493 U.S. 411, 424 (1990) (holding that "[t]he social justifications proffered for [the conduct] do not make it any less unlawful").

motivation behind either the enterprise or the predicate acts must be money.[32]

If an ultimate or overriding economic motive were required, in addition to proof of the four statutory elements required by the text of § 1962(c), *see Sedima*, 473 U.S. at 496, plaintiffs would have to present proof of all the financial benefits the defendants obtain from their criminal activities and their enterprise, and the defendants would attempt to rebut that evidence by offering evidence of their personal political, religious, social and other motives, trying to demonstrate that these motives dwarf the economic incentives that their crimes provide. The courts would have to address the serious problem of how "overriding" or "significant" the economic motive need be: Does a million dollars a year establish sufficient economic motive? Does it matter that the recipient was barely scraping by before? Can an economic motive be "overridden" by a very sincere political, social or religious belief?[33] What if other motives also exist, such as personality disorders or

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[32] Defendant Migliorino's restatement of the issue presented for review apparently agrees with this reading. Defendant Terry's Brief in Opposition to Petition for Writ of Certiorari argues that *any* economic motive, even an insignificant one, is sufficient. (Brief at 12-13) If this were true, however, the Seventh Circuit should have allowed plaintiffs to proceed with discovery and trial because even preliminary discovery showed that money is at least one of the motives for the defendants' enterprise and crimes.

[33] For example, Terry would no doubt argue that his transition from the income of a used-car salesman to nearly a million dollars a year as the head of Operation Rescue is insignificant when compared to the satisfaction he receives from the expression, through his crimes, of his personal religious beliefs about what women should do with their bodies. How would the fact-finder weigh and balance these motives and incentives under the Seventh Circuit's standard?

psychiatric problems, racial or religious animosities, the desire to control women's reproductive capacities, or the desire to make more children available for adoption or foster care?[34] What should the court do when, as in *Yarbrough*, 852 F.2d 1522, white supremacists commit financial crimes as a *means* to further their non-economic ultimate goal: the eradication (by murder in some cases) of African-Americans and Jews? (The Ninth Circuit found the murder a predicate act, even though neither it nor the enterprise was primarily or ultimately aimed at money.) Would only "good motives" count, and, if so, who would determine which were good? On what scale would a fact-finder weigh the competing motives to determine which is ultimate, overriding or sincere? If the floodgates to such issues were opened, week-long trials would turn into months-long excursions into the workings of the human mind; psychiatric experts would become commonplace in RICO trials.

Requiring a subjective inquiry into the psychological aspects of criminal acts as an element of crimes is not common in our system of justice. While some statutes (generally those outlawing discrimination) require a finding of "purpose" for liability, *e.g.*, 42 U.S.C. § 1985(3) (and this is typically established by circumstantial evidence), and criminal statutes typically require either a specific or a general intent to do the act that constitutes the violation, *see*

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[34] The World Trade Center bombers may well be sincere. The Croatian nationalists in *Bagaric* were likely sincere about their political views concerning Yugoslavia. The skinheads in *Ellison* no doubt sincerely hated African-Americans and Jews. Would these "sincere" beliefs outweigh their enjoyment of the other benefits they received from their terrorist acts? More importantly, would it nullify the *effects* of all the economic destruction they caused?

Holmes, *Privilege, Malice and Intent*, 8 Harvard L.Rev. 1, 12 (1894), the distinction between these concepts and the purely subjective concept of "motive" is an important one.[35] According to *Black's Law Dictionary* at 1164, Fourth Edition (1968),

> in the popular mind intent and "motive" are not infrequently regarded as one and the same thing. In law there is a clear distinction between them. "Motive" is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. "Motive" is that which incites or stimulates a person to do an act.

While the requirement of "intent" to commit the predicate acts is already inherent in RICO (and is readily satisfied here),[36] a separate and subjective "motive" requirement

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[35] In the antitrust context, commentators have discussed the importance of distinguishing among "motives," "intent" and "purpose." *E.g.*, Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 Northwestern L.Rev. 705, 710-11 (1962). Under this analysis, "motive" is the *subjective* aspect of a defendant's will and represents the inner needs, emotions and organic state that incites the defendant to action. *Id.* at 710. "Intent" focuses on the means that the defendant consciously or deliberately uses, without reference to defendant's anterior subjective motives or objective policy justifications, *id.* at 710-11; and "purpose" describes the defendant's goal or end result as opposed to the means that are used to try to achieve it. *Id.*

[36] The defendants' training materials and public writings admit their intent to commit predicate acts.

finds no support in the text of RICO or in criminal law,[37] and would hopelessly complicate already complex litigation.[38]

The Seventh Circuit was uncomfortable with taking the text of RICO at face value; no doubt it believed RICO was just too broad. But even if the courts had the power to amend statutes, the judicial legislation that the Seventh Circuit has created raises far more problems than it solves. The Seventh Circuit's shell-game approach to "economic motive" (Is it in the enterprise? Is it in the predicate acts?) harkens to *Sedima*, 473 U.S. at 494, where this Court warned against vague concepts. The Seventh Circuit's non-textual requirement also contravenes this Court's admonition in *H.J.*, 492 U.S. at 241 n.3: "we prefer to confront [statutory construction] problems directly, not 'by introducing a new and perhaps more amorphous concept into the analysis' that has no basis in text or legislative history."

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[37] As Professor LaFave has explained, "motive" is almost always immaterial to the substantive criminal law. *E.g.*, LaFave, W., *Criminal Law*, Vol. 1 at 319 (1986). *See United States v. Pomponio*, 419 U.S. 10 (1976) (approving jury instruction, "good motives alone is never a defense where the act done or committed is a crime").

[38] A "motive" requirement is particularly problematic when applied to defendants that are organizations, rather than individuals. As the Court found in *United States v. Donruss Co.*, 393 U.S. 297, 308 (1969), "[r]arely is there one motive, or even one dominant motive, for corporate decisions." In construing provisions of the tax code in that case, the Court adopted a standard of objective inquiry into the reasonableness of undistributed corporate earnings, rather than scrutiny into "the vagaries of corporate motive." *Id.* at 307.

Unlike the "pattern" requirement addressed in *H.J.*, RICO does not pose any statutory construction problem as far as "economic motive" is concerned. The text of RICO contains no reference to motive, purpose or goal, and the structure and legislative history of the statute are in accord. There is simply no need -- nor principled basis -- to complicate RICO discovery and trials by injecting any of these problematic and elusive elements.

II.
IF AN ADDITIONAL ECONOMIC DIMENSION WERE REQUIRED, IT IS PLED

This case comes to the Court on a motion to dismiss, which takes all well-pled facts and inferences as true. *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). No one has questioned the fact that the pleadings allege the economic *effects* required by the text of RICO; PLAN is engaged in interstate commerce and the defendants' predicate crimes have had a disastrous effect on the plaintiffs' business and property. As shown in Section I above, these are the only requirements that are true to the text and structure of RICO. The non-textual economic "dimension" requirement adopted by the Second Circuit in *Bagaric* is also satisfied here. The Second Amended Complaint and RICO Case Statement contain dozens of references to financial benefits that the defendants reap from their enterprise and predicate acts.

In fact, insofar as the Seventh Circuit's economic "motive" requirement can be understood, the facts pled here -- and facts consistent with the pleadings -- meet even that standard on motion to dismiss. For example, the complaint

alleges that the defendants are generously compensated for their work conducting the enterprise. They receive salaries and other monetary benefits such as consulting fees, expense accounts and company cars -- far more than most of them earned in their previous endeavors. J.A.71 (¶100). Many of the leaders of the enterprise were either unemployed or in low-paying positions before rising through the ranks of the enterprise. To reach PLAN's "inner circle," where they may be paid salaries or consulting fees, the defendants are required to show their loyalty by committing crimes and suffering arrest. J.A. 106. Once a member of the inner circle, they receive financial rewards far beyond what they were capable of earning in the world of legitimate business.

Former used-car salesman and would-be rock singer Randall Terry's 1989 gross income from his anti-abortion activities was over $777,000. J.A.104-105. In 1991, Operation Rescue had as many as fifteen people on its payroll. Some were designated as employees, others as "consultants," and many were paid up to $800 a week out of Operation Rescue's numerous bank accounts.[39] In 1986, defendant Scheidler received some $45,000 for his work, and his wife received salary or consultation fees as well. Scheidler also enjoys a company car and an expense account, allowing him to travel nationwide advocating

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[39] In 1989, to avoid legal responsibilities relating to judgments and fines imposed by courts nationwide, some of the defendants directed followers not to send money to central offices where the government could seize their assets, but to other payees at other addresses. Leadership explained: "we're going underground." J.A. 105-106. Such subterfuge allowed the enterprise to continue its illegal acts -- and its monetary collections -- without interruption. There can be little question that the desire to keep the money they had raised motivated at least this aspect of the enterprise's scheme.

crimes against clinics. J.A.71 (¶100), 102-104. A former bakery employee, Timothy Murphy, was put on the full-time payroll in 1989, when he began his clandestine weekly trips to transport thousands of stolen fetuses from an Illinois pathology laboratory to Scheidler's home and other chosen locations.

Furthermore, the enterprise is not inexpensive to operate, and it does not run in bare-bones fashion. From offices complete with receptionists, secretaries, accountants, and other staff, the defendants make use of sophisticated electronic equipment to plan and carry out their criminal acts. Enterprise members distribute audio-visual training materials that instruct followers in committing clinic violence and evading the law. In addition to the sales of these materials, the defendants send letters nationwide soliciting financial support for the enterprise and its criminal acts. Defendant Project Life operates clinics that compete with class member clinics in addition to carrying out other acts in furtherance of enterprise goals. Without the money raised as a result of its racketeering activities, PLAN could not exist to carry out future criminal deeds, and its leaders would have to seek legitimate work.

Dismissal of the complaint on a Rule 12(b)(6) motion, despite all these well-pled facts, ignores the allegation by NOW and the clinics that the defendants commit their racketeering activities to generate income to keep the enterprise -- and themselves -- solvent: "the more outrageous and highly-publicized the activities are, the more likely the RICO defendants and the enterprises are to receive large donations." J.A.108.[40] The Seventh Circuit

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[40] As one example, during the lengthy siege of an Atlanta clinic in (continued...)

found sales of training materials irrelevant with the mystifying comment that they did not constitute a "clear and present danger." Pet. A-34. The Seventh Circuit missed the point: although the sales of training materials are not a "clear and present danger," they are an integral part of the business of the enterprise and they establish one of its many economic dimensions.

In short, even if it were proper to engraft an "economic motive" requirement onto RICO, the pleadings here satisfy it.

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[40] (...continued)
1988, Jerry Falwell publicly presented a $10,000 check to the organizers as support for their criminal work.

III.
CONCLUSION

The plain language doctrine allows the Court to fulfill its role of interpreting and applying a statute without usurping the legislative function. For all the reasons discussed above, no economic motive requirement should be added to RICO by the courts, and the decision of the Seventh Circuit should be reversed and the case remanded for further proceedings.

Respectfully submitted,

Of Counsel:

Lowell E. Sachnoff
Jack L. Block
Judi A. Lamble
Sachnoff & Weaver, Ltd.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000

Alan M. Pollack
Mitchell G. Mandell
Scott A. Sommer
Pollack & Greene
757 Third Avenue
New York, New York 10017
(212) 421-5300

Fay Clayton
Counsel of Record
Susan Valentine
Robinson Curley &
Clayton, P.C.
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

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IN THE

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OCTOBER TERM, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Petitioners,

v.

JOSEPH SCHEIDLER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS RANDALL A. TERRY, PROJECT LIFE, AND OPERATION RESCUE

KEITH A. FOURNIER
AMERICAN CENTER FOR LAW AND JUSTICE
1000 Centerville Turnpike
Virginia Beach, VA 23464
(804) 523-7570

VINCENT P. MCCARTHY
8 South Main Street
New Milford, CT 06776
(203) 355-0923

JAY ALAN SEKULOW
(Counsel of Record)
WALTER M. WEBER
AMERICAN CENTER FOR LAW AND JUSTICE
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, D.C. 20007
(202) 337-2273

Attorneys for Respondents Randall A. Terry, Project Life, and Operation Rescue

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Whether the federal RICO statute, 18 U.S.C. § 1962(c) and (d), applies to social protest activities undertaken with a complete absence of any mercenary purpose?
2. Whether respondents' sit-ins and other nonviolent social protest activities constitute predicate "extortion" under the Hobbs Act, 18 U.S.C. § 1951?
3. Whether petitioners lack standing?

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS RANDALL A. TERRY, PROJECT LIFE, AND OPERATION RESCUE

INTRODUCTION

This brief is filed on behalf of respondents Randall A. Terry, Operation Rescue, and Project Life.[1]

Petitioners initiated this action for declaratory and injunctive relief and damages by invoking the Racketeer Influenced and Corrupt Organizations (RICO) Act (18 U.S.C. §§ 1962(a), (c) and (d)),[2] federal antitrust law,[3] and pendent state law.[4]

[1] None of these respondents is a corporation. *See* Rule 29.1.

[2] Petitioners' claim under § 1962(a) is not before this Court. The courts below rejected this claim, and petitioners did not seek review of those rulings in this Court.

[3] The antitrust claim is not before this Court. The courts below rejected this claim, and this Court denied review.

[4] Petitioners did not allege any pendent state law claims against respondents Randall A. Terry, Project Life, or Operation Rescue.

[Continued]

After nearly five years of litigation, including considerable discovery and repeated amendment of its complaint, petitioners remained unable to plead a valid cause of action under the governing federal statutes. The district court dismissed petitioners' lawsuit and the court of appeals affirmed that judgment. This Court should affirm the judgment of the court of appeals.

Petitioners Delaware Women's Health Organization and Summit Women's Health Organization, Inc.—two self-described "commercial establishments," Pet. at 6—seek to distort the federal racketeering statute into a weapon for use against social protest activities. Petitioners simultaneously seek to stretch the federal criminal extortion statute to cover virtually any conduct which forms a part of social protest activities.

This Court should finally terminate a lawsuit that was frivolous from its inception.[5] To allow this suit to proceed—as petitioners request—would be to signal a green light for the routine inclusion of civil RICO claims in all litigation involving social protest movements. Such a result would chill legitimate protest and further burden the federal judiciary, all at the expense of disregarding accepted canons of statutory construction.

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[4] [Continued]

The state law claims alleged against other respondents are "tortious interference with prospective economic advantage" (Count V), "tortious interference with existing business relationship" (Count VI), and (against defendant Vital-Med) "breach of duty of confidentiality" (County VII). The district court dismissed these claims without prejudice, and petitioners have not challenged the propriety of this dismissal in their briefs either in the court of appeals or in this Court.

[5] To state that the theory of petitioners' case borders on the absurd is to understate the situation. *See* Brief in Opposition of Respondents Randall A. Terry, *et al.* § I (petitioners listed Supreme Court Justices, politicians, journalists, etc. as having knowledge of the facts of the alleged antitrust and RICO conspiracies). Like the Second Circuit in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990), this Court should decline to "countenance fanciful invocations of the draconian RICO weapon in civil litigation," *id.* at 104.

Petitioners' case must fail for several independent reasons: first, petitioners cannot meet the threshold requirement of standing to bring suit under RICO; second, RICO does not apply to social protest activities which lack all mercenary purpose; and third, petitioners' RICO claim fails for lack of the necessary predicate acts: the sit-ins and similar social protest tactics alleged in this case cannot conceivably be treated as federal criminal extortion.

STATEMENT OF CASE

1. Statement of Facts [6]

Petitioners Delaware Women's Health Organization (DWHO) and Summit Women's Health Organization, Inc. (Summit) are commercial abortion businesses in Wilmington, Delaware and Milwaukee, Wisconsin, respectively. Second Amended Complaint (Cplt.) ¶¶ 6-7 (J.A. 41-42); *see also* Pet. at 6 (describing abortion businesses as "commercial establishments").

According to petitioners' complaint,[7] respondents consist of individuals and organizations, Cplt. ¶¶ 9, 11-12, 14-15, 17, 19-20 (J.A. 42-44), sharing a common goal of shutting down all abortion businesses in the United States, *id.* ¶ 26 (J.A. 46). These respondents are part of the "activist anti-abortion movement." *Id.* ¶ 52 (J.A. 53); *id.* ¶ 9 (J.A. 42) (respondent Scheidler is "the director

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[6] Petitioners' statement of the case is argumentative (according to petitioners, every pro-life activist is an "extremist" and a "terrorist"), reaches outside the record, and disregards the legal and constitutional requirements for vicarious liability. Such antics suggest that petitioners recognize that their lawsuit cannot stand on its own merits. *See also* Pet. Br. at 41-42 (ad hominem slurs against pro-life individuals).

[7] The district court dismissed petitioners' suit under Rule 12 (b)(6), Fed. R. Civ. P. Accordingly, for purposes of this brief respondents assume the truth of all facts properly alleged in the complaint. Petitioners, for their part, are limited to their complaint and may not resort to the RICO Case Statement to fill in gaps in a deficient complaint. A RICO Case Statement may explain, focus, or *limit* allegations in a complaint; it cannot *expand* upon or *substitute* for the complaint. *Compare* Rule 15, Fed. R. Civ. P.

of defendant Pro-Life Action League, Inc."); *id.* at ¶ 11 (J.A. 42) (respondent Terry is "the national organizer of Operation Rescue"). Respondents have agreed to "drive . . . out of business" every abortion business in the country. *Id.* ¶ 26 (J.A. 46).

The methods various respondents and other pro-life individuals allegedly employ to shut down abortion businesses include: distribution of a book "outlining methods intended to be used to interfere with and stop" abortion businesses from operating, *id.* ¶ 28 (J.A. 47) (Scheidler); training and "encouraging" other persons to use these techniques to close abortion businesses, *e.g.*, *id.* ¶¶ 29 (Scheidler), 30 (Scheidler, Terry, Scholberg, Murphy, Migliorino), 35 (J.A. 48) (Terry); organizing or participating in blockades and trespassing at abortion businesses, *e.g.*, *id.* ¶¶ 59-63 (J.A. 56-57) (various respondents and thousands of other unnamed participants); stealing fetal remains from co-defendant Vital-Med Laboratories, Inc., and then arranging "highly-publicized" funeral services and burials for these remains, *id.* ¶¶ 64-74 (J.A. 57-58) (Scheidler, Scholberg, Murphy, Migliorino, Wojnar, PLAL and other non-defendant participants);[8] damaging or destroying abortion business property (surgical supplies), *id.* ¶ 42 (J.A. 50) (non-defendant Joan Andrews); picketing, *id.* ¶¶ 48-50 (J.A. 51-52) (Scheidler and Terry); and pressuring a landlord not to lease space to petitioner Summit, *id.* ¶¶ 77-78 (J.A. 61-62) (Migliorino).

The bulk of petitioners' allegations describe activities directed at *other* abortion businesses, i.e., *not* the petitioners DWHO or Summit. *E.g.*, *id.* ¶¶ 38 (J.A. 49) (Women's Awareness Clinic in Florida), 42 (J.A. 50)

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[8] Respondent Scheidler announced publicly in 1988 that the remains were "individually packaged and labelled . . . with the names of the mothers, doctors, dates and places" of the abortions. *Id.* ¶ 70 (J.A. 59). Petitioners have not alleged that any of the respondents have "threatened" to reveal this information. Petitioners' *legal* conclusion that respondents "threatened to disclose confidential information about previous patients," *id.* ¶¶ 98(j), 98(l) (J.A. 69-70) (Count II) (listing alleged predicate acts), finds no support in petitioners' *factual* allegations.

(Ladies Center of Pensacola, Inc. in Florida), 60 (J.A. 56) (various sites in the State of New York). Other allegations refer to efforts targeting abortion businesses *in general*. *E.g.*, *id.* ¶¶ 28-30 (J.A. 47) (promoting efforts to close abortion businesses "such as DWHO and Summit").

Petitioners do not allege that respondents Terry, Operation Rescue (OR), or Project Life undertook any activity at or against DWHO or Summit. In fact, few allegations refer to *anyone* taking action at or against DWHO and Summit. *See id.* ¶¶ 44 (J.A. 50) (trespass by Scheidler at DWHO and "threat" by Scheidler, to DWHO administrator, of "reprisals" if she did not quit her job), 71 (J.A 59) (Migliorino arranged funeral and burial for 1200 aborted babies and stated that 700 of the bodies came from Summit and another Milwaukee abortion business), 76 (J.A. 60) (defendant Vital-Med, a pathology service, refused to accept further aborted babies from DWHO or Summit), 77-78 (J.A. 61-62) (Migliorino helped induce breach of Summit's lease). None of these allegations involve respondents Terry, OR, or Project Life.

Petitioners allege that respondents receive income in the form of "contributions . . . in support" of their acts designed to shut down abortion businesses, *id.* ¶ 100 (J.A. 71), and that certain individual respondents receive salaries and benefits for their pro-life work, *id.*

Petitioners have *not* alleged that respondents have received any income or other property aside from donations from their pro-life supporters (and salaries and benefits derived from these donations). Petitioners have *not* alleged that respondents have demanded, requested, or even suggested that petitioners or any other abortion businesses, staff, or clientele turn over money or other property either to respondents or to any other persons or organizations. Furthermore, petitioners have *not* alleged that any of the respondents have any financial or economic purpose for shutting down abortion businesses. Nor have petitioners alleged that respondents have any purpose for their actions

other than a genuine, deeply held desire to stop the killing of unborn children by abortion.

2. Course of Proceedings

Petitioners filed their original complaint on October 17, 1986 (J.A. 1), an amended complaint on February 2, 1989 (J.A. 9), and a second amended complaint on September 22, 1989 (J.A. 13). The second amended complaint (J.A. 39) alleged claims under the RICO (§§ 1962(a), (c), (d)) and antitrust statutes and included pendent state law claims. On March 18, 1991, petitioners submitted a RICO Case Statement (J.A. 87) in response to an order of the district court (J.A. 81).

On May 28, 1991, the district court dismissed the second amended complaint. *National Organization for Women v. Scheidler,* 765 F. Supp. 937 (N.D. Ill. 1991) (Pet. B-1 to 18). The district court held that petitioners failed to state a claim, under the federal antitrust and racketeering laws, upon which relief could be granted. The district court accordingly declined to exercise pendent jurisdiction over the remaining state claims, and dismissed the case in its entirety.

The court of appeals affirmed, *NOW v. Scheidler,* 968 F.2d 612 (7th Cir. 1992) (Pet. A-1 to 37), and denied rehearing and rehearing en banc (Pet. G-1 to 2).

Petitioners sought review in this Court on their antitrust claim and two of their RICO counts (§§ 1962(c), (d)). This Court granted review limited to the RICO counts. *NOW v. Scheidler,* 113 S. Ct. 2958 (1993).

SUMMARY OF ARGUMENT

Petitioners are attempting to use the federal RICO statute as a weapon against social protest activities. This attempt must fail for at least three independent reasons.

1. Petitioners lack standing to bring RICO claims against respondents. The complaint alleges a laundry list of activities but fails to allege that *these particular respondents* committed any predicate acts which injured

these particular petitioners. Consequently, petitioners have failed to show either the "injury in fact" necessary to establish Article III standing or the "proximate causation" necessary to establish RICO standing.

2. RICO does not apply to social protest activities which lack any mercenary purpose whatsoever. Both the text and the manifest purpose of RICO show that Congress designed the statute to take the *profit* out of crime. RICO does not simply federalize or enhance the penalties for an arbitrary list of crimes designated as "racketeering activities." Rather, RICO targets *mercenary* criminal activity, as evidenced by the statutory title, statement of findings, definitions, prohibitions, and remedies.

3. Petitioners have failed to alleged the predicate acts necessary for a RICO claim. Social protest activities which neither "obtain property" nor employ "force, violence, or fear" simply do not constitute "extortion" under the Hobbs Act, 18 U.S.C. § 1951. Because petitioners have rested their entire RICO suit upon an over-expansive misreading of the Hobbs Act, the RICO claims in this case must fail.

This Court should affirm the judgment below which upheld the dismissal of petitioners' defective RICO suit.

ARGUMENT

The district court dismissed petitioners' RICO claims pursuant to Rule 12(b)(6), Fed. R. Civ. P. The court of appeals properly affirmed that dismissal, holding that respondents' alleged activities are "not within the reach of . . . RICO." 961 F.2d at 631. This Court should affirm the judgment of the court of appeals.[9]

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[9] Affirmance follows regardless of whether the decision below is treated as a dismissal or a grant of summary judgment. *See* Brief of Respondent Murphy. A RICO Case Statement is not a pleading. Therefore, petitioners may not rely upon it, to compensate for defects in their complaint, when challenging a judgment of dismissal. If petitioners *do* wish to rely upon their RICO Case Statement, then that statement—and the judgment below—must be reviewed under the standards governing summary judgment.

I. PETITIONERS DWHO AND SUMMIT LACK STANDING.

The only claims before this Court are the RICO claims of petitioners DWHO and Summit,[10] under 18 U.S.C. §§ 1962(c) and (d),[11] against certain respondents.[12] DWHO and Summit lack standing, on the face of their complaint, to bring these claims against respondents.[13]

A. Petitioners Lack Article III Standing.

To maintain an action in federal court, a plaintiff must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" and that this injury "fairly can be traced to the challenged action," *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982) (internal quotation

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[10] The National Organization for Women (NOW) was also a plaintiff in this case. NOW sued only under the federal antitrust statutes. Cplt. ¶¶ 79, 92-93 (J.A. 62, 64) (Count I). The lower courts rejected this claim. NOW petitioned this Court for review, Pet. at i (Question 2), but this Court denied review. NOW was not a plaintiff on any of the RICO claims. *See* Cplt. ¶¶ 94, 106, 111 (J.A. 65, 72, 74).

[11] Petitioners DWHO and Summit brought a claim under RICO section 1962(a), *see* Cplt. ¶¶ 94-105 (J.A. 65-72), but the lower courts rejected this claim. Petitioners did not seek review in this Court of that portion of the judgment below.

Petitioners DWHO and Summit also brought claims under state law. None of these claims sought relief against respondents Terry, Operation Rescue, or Project Life. The district court dismissed these claims without prejudice, and petitioners have not argued that this dismissal was erroneous.

[12] The complaint named respondents Scheidler, Scholberg, Murphy, PLAL, Terry, OR and Project Life as "RICO defendants" under § 1962(c) and (d). *See* Cplt. ¶¶ 94, 106, 111 (J.A. 65, 72, 74). The complaint named respondent Migliorino as a defendant under § 1962(c) but not under § 1962(d). *See id.* ¶¶ 106, 111 (J.A. 72, 74).

[13] Standing is a jurisdictional requirement which remains open to review at all stages of the litigation. *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 546-47 (1986).

marks and citations omitted). In other words, a plaintiff must show that the defendant (not someone else) violated a legal norm and that defendant's violation (not something else) caused injury to plaintiff (not to someone else).

This threshold minimum is a mandatory requirement of Article III of the Constitution. *Id.* Furthermore, a plaintiff bears the burden of establishing standing to sue. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 n.8 (1986). The necessary showing "must affirmatively appear in the record," *id.* at 546 (footnote omitted); "it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings," *id.* at 547 (citations omitted).

Petitioners' complaint fails to satisfy this basic constitutional requirement.

1. No allegation by DWHO or Summit against Project Life

The complaint alleges no predicate acts whatsoever by respondent Project Life. Hence, petitioners lack standing to sue Project Life. (Petitioners acknowledged this in their RICO Case Statement, which omits Project Life as a RICO defendant. RICO Case Statement ¶ 1 (J.A. 87-88); *id.* Ex. A (J.A. 137).)

2. No allegations by DWHO or Summit against Terry or Operation Rescue

The complaint fails to allege that respondents Terry or Operation Rescue committed any predicate acts against petitioners DWHO or Summit.

The complaint sets forth a lengthy list of alleged predicate acts as the basis for the RICO claims under § 1962(c) and (d). *See* Cplt. ¶¶ 98 (J.A. 66-70) (listing predicate acts), 109 (J.A. 73) (incorporating, for § 1962(c) claim, ¶ 98 [14]), 111 (J.A. 74) (incorporating, for § 1962(d)

[14] The complaint actually lists the wrong paragraph number, viz., ¶ 99.

claim, ¶ 109). Of the twelve predicate acts listed, eight make no mention whatsoever of either DWHO or Summit. *See* Cplt. ¶ 98(a)-(f), (h), (i) (J.A. 66-69).

The four remaining alleged predicate acts make no mention of Terry or OR. *Id.* ¶ 98(g), (j)-(*l*) (J.A. 68-70).[15] Hence, petitioners lack standing to sue Terry and OR.[16]

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[15] Paragraph 98(g) alleges an act by respondent Scheidler on his own; no conspiracy by any others is alleged. Furthermore, this incident predates the involvement of Terry and OR in the alleged "enterprise." According to the complaint, Terry first proposed Operation Rescue in November, 1986, *id.* ¶ 56 (J.A. 55), and OR was not organized until months later, *id.* ¶ 57 (J.A. 55). Scheidler's alleged act took place on April 12, 1986, i.e., prior to the involvement of Terry or OR in the alleged "enterprise." Accordingly, petitioners cannot hold respondents Terry or OR liable on any theory of "retroactive" conspiracy. *Levine v. United States*, 383 U.S. 265, 266 (1966) (per curiam) (individual cannot be held liable for substantive offenses committed by members of the conspiracy before that individual had joined the conspiracy).

Paragraphs 98(j)-(l) allege acts, attempts, and conspiracies by certain named respondents and others associated with them but specifically omit Terry and OR.

[16] Summit and DWHO lack standing to sue the other respondents as well.

Of the four remaining allegations, three refer to the theft and burial of aborted babies, while the fourth refers to an incident at DWHO involving respondent Scheidler. None of the alleged predicate acts even name respondent Scholberg.

1. *Aborted babies.* The "aborted babies" allegations allege three predicate acts against "clinics affiliated with plaintiffs DWHO and Summit," but allege no action against DWHO or Summit in particular. *Id.* ¶ 98(j)-(l) (J.A. 69-70). The only connection petitioners allege between these activities and petitioners is a statement, by respondent Migliorino, that 700 of the bodies came originally from Summit and another Milwaukee abortion business. *Id.* ¶ 71 (J.A. 59).

The alleged misconduct consisted of (a) stealing aborted babies from co-defendant Vital-Med, (b) publicizing the possession of these remains and the fact that the remains were labelled with names of facilities, physicians, and patients, and (c) conducting public funerals and burials for these aborted babies. *See also supra* note 8. Activity (a) is not directed at Summit or DWHO. Activities

B. Petitioners Lack RICO Standing.

Petitioners DWHO and Summit have failed, on the face of their complaint, to allege proximate causation between respondents' alleged violations of § 1962 and petitioners' asserted injuries. Thus, petitioners lack RICO standing, i.e., they fail to allege an injury within the scope of the RICO statute.

To bring suit under RICO, it is not enough to claim that the defendant violated § 1962 and that the plaintiff suffered injury. On the contrary, there must be a direct *connection* between the violation of RICO and the plaintiff's injury: "the plaintiff only has standing if, and can only recover to the extent that, he has been *injured* in his business or property *by* the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (emphasis added). As the RICO statute itself explicitly provides, only a "person *injured* in his business or property *by reason of* a violation of section 1962 of this chapter may sue therefore . . . ." 18 U.S.C. § 1964(c) (emphasis added). This means that the plaintiff must allege and prove facts establishing that the RICO violation *proximately caused* the injuries plaintiff claims. *Holmes v. SIPC*, 112 S. Ct. 1311 (1992).

For their claims under § 1962(c) and (d) (the only claims before this Court), DWHO and Summit specify the alleged injuries in their complaint. *See* Cplt. ¶¶ 104-05

(b) and (c) are protected forms of speech. Hence, these incidents are insufficient bases for standing.

2. *Threat of "reprisals."* The only remaining alleged predicate act alleges that respondent Scheidler threatened DWHO's administrator with "reprisals" if she did not quit working at DWHO, *Id.* ¶ 98(g) (J.A. 68). DWHO does not allege that this "threat" injured DWHO in any way. On the contrary, DWHO acknowledges that the administrator remained at her job for a full year afterwards. *Id.* ¶ 44 (J.A. 50-51). Nor is an ambiguous allegation of threatened "reprisals" sufficient to show anything beyond the bounds of protected free speech. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 921 (1982) ("threats" of "social ostracism, vilification, and traduction"). Furthermore, petitioners allege no conspiracy; hence, this alleged "threat" implicates no one aside from Scheidler.

(J.A. 72) (injury under § 1962(a)), 110 (J.A. 73) (incorporating injury set forth in ¶¶ 104-05 for § 1962(c)), 114 (J.A. 74) (incorporating injury set forth in ¶¶ 104-05 for § 1962(d)). These paragraphs provide as follows:

> 104. Each defendant's violation of 18 U.S.C. § 1962(a) has injured the business and/or property interests of the plaintiffs and the class members. The RICO Defendants' investment of income received from the pattern of racketeering activity or the proceeds therefrom has injured plaintiffs by furthering those illegal goals of PLAN, and/or PLAL, OR or the Project which involve extortionate and anti-competitive activities against abortion providers.
>
> 105. Specifically, the RICO Defendants' activities have decreased the business of and/or increased the cost of doing business at, DWHO, Summit and similarly-situated clinics. The RICO Defendants' activities have injured the plaintiff class of female NOW members and other women who have been unable to obtain abortion services, or whose choice of clinics that provide these services has been restricted, by depriving them of the right to choose freely between abortion providers in an unthreatened marketplace and to reap the economic and medical advantages of having that choice.

The injury asserted in ¶ 104 relates exclusively to respondents' "investment of income"—i.e., petitioners' § 1962(a) claim—and thus has no relevance to the § 1962(c) and (d) claims at issue here.

The second sentence of ¶ 105 asserts injury to NOW and the class it claimed to represent. Neither NOW nor this class, however, are RICO plaintiffs.[17]

The allegation upon which the standing of DWHO and Summit ultimately rests, then, is the assertion that respondents' "activities have decreased the business of,

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[17] To the extent that this allegation is taken as claim of direct injury to DWHO and Summit by decreasing their business, it is subsumed under petitioners' explicit allegation to this effect, discussed below.

and/or increased the cost of doing business at, DWHO [and] Summit . . . ." *Id.* ¶ 105 (J.A. 72).

Petitioners have not alleged as predicate acts actual blockades of DWHO and Summit or actual property destruction at DWHO and Summit. Rather, as discussed *supra* § I(A), petitioners have alleged such acts only at *other* abortion businesses.

Petitioners contend that these rescue blockades *elsewhere* have induced insurance companies to raise premiums, and induced landlords, security services, and laboratory facilities to charge higher rates, *for DWHO and Summit.* Cplt. ¶ 87 (J.A. 63). *See also* RICO Case Statement ¶ 15 (J.A. 112). Petitioners may also argue that respondents' activities *elsewhere* have induced women not to patronize *DWHO and Summit.*

These contentions do not show proximate cause. DWHO and Summit cannot sue respondents for blockading *other* abortion businesses any more than Operation Rescue can sue pro-abortion vandals for damaging the offices of *other* pro-life groups. Whether market forces in fact translate these third-party incidents into increased costs for petitioners is beside the point. "Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendants' acts was generally said to stand at too remote a distance to recover." *Holmes,* 112 S. Ct. at 1318 (citation omitted).

As this Court explained in *Holmes,* there are very powerful practical reasons for adhering to the traditional limits of proximate causation. If businesses which were not directly harmed were allowed to sue for indirect injuries,

> the district court would first need to determine the extent to which [plaintiffs' alleged harm] was the result of the alleged [RICO violation], as opposed to, say . . . poor business practices or their failures to anticipate developments in the [relevant] markets.

> Assuming that an appropriate assessment of factual causation could be made out, the district court would then have to find some way to apportion the possible respective recoveries by the [directly injured non-parties] and the [plaintiffs], who would otherwise each be entitled to recover the full treble damages. Finally, the law woud be shouldering these difficulties despite the fact that those directly injured . . . could be counted on to bring suit for the law's vindication.

Id. at 1320. Limiting standing to those who show proximate causation is entirely compatible with RICO:

> the congressional admonition that RICO be "liberally construed to effectuate its remedial purposes," . . . does not deflect our analysis. There is, for that matter, nothing illiberal in our construction: We hold not that RICO cannot serve to right the conspirators' wrongs, but merely that [indirectly injured parties] are not proper plaintiffs. Indeed, we fear that RICO's remedial purposes would more probably be hobbled than helped by [plaintiff's] version of liberal construction: Allowing suits by those injured only indirectly would open the door to massive and complex damages litigation which would not only burden the courts, but also undermine the effectiveness of treble-damages suits.

Id. at 1321 (editing marks and citations omitted).

Neither DWHO nor Summit has alleged any injury flowing from predicate acts directed toward DWHO or Summit.[18] Thus, DWHO and Summit lack RICO standing.

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[18] *See supra* note 16. Again, petitioners allege no act whatsoever by respondents Terry or OR at or against either DWHO or Summit.

Summit alleges that respondent Migliorino illegally induced Summit's landlord to breach Summit's lease. Cplt. ¶¶ 77-78, 124-29 (J.A. 61-62, 77-78). Summit sued Migliorino for this under state law in a pendent tort claim, *id.* ¶ 123 (J.A. 77), but did not allege this as

In sum, petitioners DWHO and Summit lack standing under both Article III and the RICO statute to prosecute their claims under § 1962(c) and (d). This Court should accordingly dismiss the writ of certiorari as improvidently granted or, in the alternative, affirm the judgment of the court of appeals.

II. PETITIONERS' RICO CLAIMS MUST FAIL BECAUSE RESPONDENTS' ACTIVITIES REFLECT NO MERCENARY PURPOSE.

The court below affirmed the dismissal of this case on the basis that respondents' activities lacked a mercenary purpose and thus fell outside the purview of RICO. That decision was entirely correct, and this Court should affirm.

Petitioners and their amici have focused virtually all of their arguments on this question. It is therefore important, at the outset, to dispose of several preliminary matters.

First, the question whether RICO applies to defendants who act without any mercenary purpose at all is a non-issue *in this case.* Petitioners have exclusively alleged, as predicate offenses, "extortion" in violation of the Hobbs Act, 18 U.S.C. § 1951. Whereas extortion is a classic "property crime," the Court has no occasion to reach the RICO issue: if petitioners had truly alleged (which they have not) that respondents *obtained* (or

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a predicate act under RICO. Hence, this incident cannot supply standing under RICO.

Petitioners' RICO Case Statement asserts that on May 10, 1986, respondent Migliorino took part in a blockade at Summit. J.A. 121. (This is the only blockade of either Summit or DWHO which appears anywhere in the RICO Case Statement.) This allegation does not appear in the complaint, either as an alleged predicate act or otherwise.

Neither of the foregoing incidents allege any involvement by respondents Terry, OR, or Project Life. Furthermore, the Migliorino blockade predates the alleged involvement of Terry, OR, or Project Life with the other respondents. *See supra* note 15.

conspired or attempted to obtain) *property* by extortion, then respondents' mercenary purpose would be clear; on the other hand, if petitioners in fact have not alleged that respondents obtained (or conspired or attempted to obtain) property by extortion, then there are no predicate acts to support petitioners' RICO claims. In either event, it is unnecessary to decide whether RICO applies to totally non-mercenary activities.[19] For this reason, as well as petitioners' lack of standing, *supra* § I, this Court should dismiss the writ of certiorari as improvidently granted.

Second, the argument that courts should not "invent" additional nontextual requirements for RICO is a red herring. "Just as we are not at liberty to seek ingenious analytical instruments to avoid giving a congressional enactment the broad scope its language and origins may require, . . . so too are we not at liberty to recast this statute to expand its application beyond the limited reach Congress gave it." *Ngiraingas v. Sanchez*, 495 U.S. 182, 192 (1990) (editing marks and citations omitted). In particular, "RICO's 'liberal construction' clause . . . is not an invitation to apply RICO to new purposes that Congress never intended." *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1172 (1993).

The text of RICO confirms the wisdom of the decision below. *Infra* § I(A)(2). To ignore the *connotations* of statutory language and the *context* of a statute would be to *frustrate*, not further, the purpose of Congress. For example, just because the text of the statute does not use the magic phrase "proximate causation," this does not mean that RICO claims face no such requirement. *See Holmes v. SIPC*, 112 S. Ct. 1311 (1992). Nor does the

[19] Petitioners, perhaps sensing this major logical gap in the pertinence of their arguments, attempt to preserve the RICO issue by reference to "arson" and "bombing," offenses which do not *ipso facto* demonstrate a mercenary purpose. *E.g.*, Pet. Br. at 4. This device fails: petitioners have not alleged any predicate arson or bombing by respondents. *See infra* § III(A).

absence of the phrase "operation or management" preclude the recognition of such a test for determining what constitutes "conduct" of an enterprise in violation of RICO. *See Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993).[20]

The true question is what interpretation of the text most faithfully implements the purpose of Congress. *Commissioner v. Engle*, 464 U.S. 206, 217 (1984); *United States v. Alpers*, 338 U.S. 680, 681-82 (1950) ("The most important thing to be determined is the intent of Congress"). It is that question to which respondents now turn.

A. RICO Does Not Apply to Social Protest Activities Undertaken Without Any Mercenary Purpose.

This Court has already recognized the danger that over-eager litigants will try to stretch statutory language "to apply RICO to new purposes that Congress never intended." *Reves*, 113 S. Ct. at 1172. That is precisely what petitioners are doing when they seek to convert RICO into a weapon against social protest.

"In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (citations omitted). *Accord United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am.*, 113

[20] This Court has applied this same common-sense approach to statutes containing far fewer textual indications than are found in RICO. Thus, this Court has construed 42 U.S.C. § 1983 to include a defense of "qualified immunity," even though no such words appear on the face of the statute. *E.g., Malley v. Briggs*, 475 U.S. 335, 339 (1986) ("Although the statute on its face admits of no immunities, we have read it in harmony with general principles of tort immunities and defenses rather than in derogation of them") (internal quotation marks and citation omitted). Neither "rule of reason" nor "Noerr-Pennington doctrine" appear in the text of antitrust laws; yet these are accepted statutory glosses. *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). Countless other examples could be cited.

S. Ct. 2173, 2182 (1993). Both the manifest purpose and the text of RICO demonstrate its inapplicability to social protest activities which lack any mercenary purpose.

1. *This Court's view of the purpose of RICO*

Petitioners appear to operate on the premise that the purpose of RICO was simply to federalize, or enhance penalties for, an arbitrary list of crimes designated as "racketeering activities." *See* Pet. Br. at 23-25 (equating violation of RICO with violation of predicate offenses). This premise is false.[21]

The purpose of RICO, as this Court has repeatedly acknowledged, was to strike at the "source of economic power" of organized crime. *Russello v. United States*. 464 U.S. 16, 27 (1983) (internal quotation marks and citation omitted). Whereas, "in the view of Congress, the economic power of organized crime derived from its huge illegal *profits*," *Russello*, 464 U.S. at 28 (emphasis added, citation omitted), it was only natural that Congress should target the corrupt acquisition of funds: "Congress could not have hoped successfully to attack organized crime's economic roots without reaching racketeering *profits*. During the congressional debates, the sources and magnitude of organized crime's *income* were emphasized repeatedly." *Id.* (emphasis added, citations omitted). *See United States v. Turkette*, 452 U.S. 576, 591-93 & n.14 (1981) (documenting purpose of targeting criminal revenue). Thus, "[t]he aim [of civil RICO remedies] is to divest the [defendant enterprise] of the fruits of its ill-gotten gains." *Turkette*, 452 U.S. at 585. Contrary to petitioners, Pet. Br. at 23-25, "Congress fully recognized that racketeers do not engage in predicate acts *as ends in themselves*; instead, racketeers threaten, burn, and murder in order to induce their victims to act in a way that accrues to the *economic benefit* of the racketeer . . . ."

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[21] If petitioners' reductionist view of RICO were correct, the entire complex statutory scheme of "patterns," "enterprises," etc. would be no more than so many obstacles to the maintenance of successful actions under RICO.

Sedima, 473 U.S. at 519 (Marshall, J., joined by Brennan, Blackmun, and Powell, JJ., dissenting) (second emphasis added). Hence, Congress targeted crimes in which "the racketeer engaged in criminal acts in order to accomplish a commercial goal . . . ." *Id.* at 517. "The broader goal was to remove the *profit* from organized crime by separating the racketeer from his *dishonest gains.*" *Russello,* 464 U.S. at 28 (emphasis added).

RICO is a statutory weapon crafted to remedy the acquisition of economic power by means of serious criminal behavior (the predicate acts). To use RICO in the entirely different context of social protest would be like using a front-loader to weed a garden.

Where, as here, the protest activities of the RICO defendants have no mercenary purpose, use of RICO represents abuse of RICO.

2. *The statutory language*

The text of RICO represents an elaborate—and deliberate—statutory framework targeting mercenary criminal activities. The statute has no application to activity that lacks any mercenary purpose.

a. *Enterprise*

The RICO statute in 18 U.S.C. § 1962(c) forbids "any person employed by or associated with any *enterprise* engaged in, or the activities of which affect, interstate commerce, to conduct or participate . . . in the conduct of such *enterprise's* affairs through a pattern of racketeering activity . . ." (emphases added). The concept of "enterprise" within the meaning of RICO requires at least some economic purpose or profit-seeking activity on the part of the RICO defendants.

RICO does not define the term "enterprise" explicitly. Instead, the statute merely provides that " 'enterprise' *includes* any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). By using the

term "includes" instead of "means," Congress clearly indicated that not *every* individual, partnership, and so forth qualifies *per se* as an enterprise. *See H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 237-38 (1989) (analyzing the term "pattern" in RICO) (by using a word other than "means" in a definition, the RICO statute "assumes that there is something to [the defined term] *beyond* simply the [elements set forth in the definition]") (emphasis in original).

The "enterprise" concept would be superfluous if *every* person, legal entity, or association automatically qualified as an enterprise. Congress was perfectly capable of using a word like "entity" or some other generic term having no commercial connotations, but chose instead to use the term "enterprise." Fidelity to legislative intent requires this Court to take this choice of terminology seriously.

In analyzing the term "enterprise," this Court "must start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *H.J. Inc.*, 492 U.S. at 238 (internal quotation marks and citations omitted). This is especially true when the statute itself "does not identify . . . [the] additional prerequisites for establishing the existence" of the statutory element. *See id.*

An "enterprise," according to Webster's Third New International Dictionary (1986), can *in the abstract* be any plan, design, or undertaking. *Id.* at 757. Petitioners seize upon this definition. Pet. Br. at 21-22. But RICO clearly does not incorporate *this* meaning of "enterprise"; the statutory definition includes *entities*, not mere "activities" or "designs." The first *concrete* definition given for an enterprise is as follows: "a unit of economic organization or activity (as a factory, a farm, a mine); *esp*: *a* business organization: FIRM, COMPANY." *Id.* (definition 1(c)). This economic connotation also appears in such uses as "Acme Enterprises" or the term "enterpriser," i.e., an "entrepreneur," defined as "the organizer of an

economic venture; *esp*: one who organizes, owns, manages, and assumes the risks of a business . . . ." *Id.* at 757 (definition of "enterpriser"), 759 (first definition of "entrepreneur").

Congress has also defined "enterprise" in a different statute, the Fair Labor Standards Act. That statute provides as follows: " 'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons *for a common business purpose* . . . ." 29 U.S.C. § 203(r)(1) (emphasis added). This definition is helpful for at least two reasons. *First,* this statute confirms congressional intent to adopt the ordinary connotation of "enterprise" as something having a profit-seeking purpose. *See e.g., Gollust v. Mendell,* 111 S. Ct. 2173, 2179 (1991) (congressional intent to adopt common understanding of a term is confirmed by use of the same word with that same meaning in other federal statutes). *Second,* this statutory definition of "enterprise" existed prior to the passage of RICO. *See Brennan v. Arnheim & Neely, Inc.,* 410 U.S. 512, 516-17 (1973) ("enterprise" concept added to FLSA in 1961). Congress is presumed to legislate with an awareness and understanding of the current meaning of the terms of existing laws. *Miles v. Apex Marine Corp.,* 498 U.S. 19, 32 (1990).

Other provisions of RICO further bolster this conclusion by indicating that the term "enterprise" must mean an undertaking in which one can "invest" by acquiring an "interest" in or funding the "establishment or operation" of the enterprise, *see* 18 U.S.C. § 1962(a), (b), and that an enterprise is something which can accrue or produce income for the racketeer, *see* 18 U.S.C. § 1963(e). The plain implication of the text, then, is that an "enterprise" under RICO must, at least in part, pursue some *economic* goal. "We should not lightly infer that Congress intended the term to have wholly different meanings in neighboring subsections." *Sedima,* 473 U.S. at 489 (footnote omitted).

b. *Title, preface, definitions, remedies*

There are other textual indicators which confirm the Congressional understanding that RICO targeted *mercenary* criminal activity, not social or political protest.

First, the title of the statute, "Racketeer Influenced and Corrupt Organizations," serves as an "aid in showing what was in the mind of the legislature," *United States v. Palmer,* 16 U.S. (3 Wheat.) 610, 631 (1818). The terms "racketeer" and "corrupt" connote mercenary purposes. "Racketeer" means "A person who *makes money* by violations of racketeering laws." *Black's Law Dictionary* 1132 (5th ed. 1979) (emphasis added). "Racket," in turn, means "Engaging in an operation to *make money* illegitimately . . . ." *Id.* (emphasis added). *See also Webster's Third New International Dictionary* 1871 (1986) ("racketeer" is "one who extorts money or advantages . . ."). "Corrupt," meanwhile, indicates a purpose of illegitimate profiteering. *See Black's Law Dictionary, supra,* at 311 ("corruptly," when used in a statute, "generally imports a wrongful design to acquire some pecuniary or other advantage").

Second, the Congressional findings prefacing RICO confirm this understanding. These findings, quoted at length in *United States v. Turkette,* 452 U.S. 576, 588-89 (1981), explicitly identify the evil which RICO seeks to remedy: "organized crime derives a major portion of its power through *money obtained* from . . . illegal endeavors"; these mercenary endeavors "drain billions of dollars from America's economy" into the pockets of racketeers who then use "this money and power . . . to infiltrate and corrupt" businesses, unions, and government bodies, producing significant additional harm to the economy of the nation. *Id.* at 588 (internal quotation marks and citation omitted). The declared purpose of the RICO legislation was clearly to deny racketeering activity "the fruits of its ill-gotten gains." *Id.* at 585.

Third, only a "person" can violate RICO, § 1962, and "person" includes only an individual or entity "capable of holding a legal or beneficial interest in property," § 1961(3). This limitation would make no sense if a violation of RICO bore no relation to the illegal *acquisition of property*.

Fourth, the statutory remedies RICO provides—forfeiture, 18 U.S.C. § 1963, and treble damages and attorney fees, 18 U.S.C. § 1964(c)—clearly indicate a desire to strike at *mercenary* criminal activity. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 151 (1987) (RICO provides "broad and flexible remedies" against the "business activities" of organized crime) (internal quotation marks and citations omitted). Statutory weapons designed to take the profit out of racketeering simply makes no sense in the context of purely social, political, or religious protest movements.

3. *Workability*

The United States claims that using RICO only against mercenary criminal activities could impair prosecution of political and religious terrorism. U.S. Br. at 1-2. But the former RICO Guidelines of the Justice Department itself explicitly barred any indictment charging an "association in fact" as an enterprise " 'unless the association in fact has an ascertainable structure which exists for the purpose of maintaining operations directed toward an *economic goal . . .*,' " *United States v. Ivic*, 700 F.2d 51, 64 (2d Cir. 1983) (emphasis in *Ivic*) (quoting Guideline VI) (superseded in 1984, *see* U.S. Br. at 17). The United States has cited no instance in which the government has been unable, under *other* statutes, adequately to prosecute criminal social protest activities that were devoid of mercenary purposes.

This statutory requirement of at least some financial purpose is not a judicially created obstacle to the proper functioning of RICO. Rather, as the Seventh Circuit recognized in this case, "this interpretation of § 1962(c) is

dictated by the terms of the statute," 968 F.2d at 629. The mercenary purpose requirement does no more than recognize the fundamental difference between schemes which engage in racketeering and corruption, even as a sidelight, *e.g.*, *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840, 917 (1983) (extorting payments from moderate Croatians as a means of furthering predominant nationalist political goals), from movements which address exclusively political or social goals and, while breaking some laws, commit no "economic" crimes, *cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (civil rights activism included violent incidents).

The requirement of a mercenary purpose marks the essential boundary between social protest and criminal corruption.[22] As such, this requirement has already long served, without any apparent practical enforcement difficulty, in the context of the Hobbs Act. As this Court has observed, the "entire character" of a protest "change[s] from legality to criminality" when the protest is used "to exact the payment of money as a condition of its cessation." *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973) (editing marks and citation omitted). "In short, when the *objectives* of the [protest activities] change[] from legitimate . . . ends to personal payoffs," then the actions become corrupt and criminal. *Id.* (emphasis added). To recognize a requirement of a mercenary purpose in RICO is to do no more than to acknowledge this same crucial distinction.

As the court below observed, the question whether the enterprise is "geared toward economic gain," 968 F.2d at 628, requires no "vague, amorphous" inquiry, *id.* at 629.

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[22] Petitioners' supposed list of contrary cases is specious. Pet. Br. at 37. Aside from the abortion protest cases, the decisions petitioners cite all involved economic crimes like robbery, bribery, and illegal gambling.

Nor need a court inquire as to subjective motivations.[23] Rather, the economic purpose requirement posits a straightforward, bright-line test: Is there *any* mercenary purpose? The crucial distinction is between "some" and "none"—between something and nothing—and that is all the difference in the world.[24]

B. Respondents' Activities Reflect No Mercenary Purpose.

The court of appeals applied the mercenary purpose requirement to the facts of the case at bar and correctly concluded that petitioners' complaint failed to satisfy this statutory requisite. 968 F.2d at 630.

In the instant case, petitioners have alleged no mercenary purpose whatsoever on the part of respondents. Petitioners point to the fact that respondent organizations receive third-party donations to support their work and that some of the individual respondents receive salaries or

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[23] Petitioners make much of the term "motivation" in the opinion below. However, it is clear in context that this term must refer to objective goals, not subjective desires.

[24] The circuits that have actually addressed the relevant issue—the Second and Eighth—are in harmony with the Seventh Circuit. *See United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983); *United States v. Bagaric*, 706 F.2d 42, 53, 55 (2d Cir.), *cert. denied*, 464 U.S. 840, 917 (1983); *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1983); *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988) ("For purposes of RICO, an enterprise must be directed toward an economic goal") (citing *Ivic*). *See generally* Brief in Opp. of Respondents Terry, *et al.* at 8-10.

The district courts that have addressed this issue since the Seventh Circuit ruled in this case have uniformly followed that decision. *See Town of West Hartford v. Operation Rescue*, 792 F. Supp. 161, 168-69 (D. Conn. 1992), *vacated on other grounds*, 991 F.2d 1039 (2d Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3093 (U.S. July 19, 1993) (No. 93-126); *Webster v. Operation Rescue*, No. 91-C-20138 (N.D. Ill. Oct. 9, 1992) (1992 WL 281366); *Lucero v. Operation Rescue of Birmingham*, No. CV91-PT-1082-S (N.D. Ala. Mar. 2, 1993); *Women's Pavilion, Inc. v. Moriarty*, No. 3:91CV7250 (N.D. Ohio Dec. 23, 1992).

in-kind benefits (e.g., use of a car) from these organizations. Cplt. ¶ 100 (J.A. 71). But as the Seventh Circuit held, "it is not reasonable to infer that the purpose of the [petitioners' alleged conduct] is to raise funds" simply because that conduct "results incidentally in donations to support it," *id.*

Petitioners also argue that the negative economic *effect* on abortion businesses allegedly resulting from respondents' activities satisfies the economic *purpose* requirement. Pet. Br. at 45. This contention is patently meritless, as it "renders the distinction between 'purpose' and 'effect' utterly meaningless." *Bray v. Alexandria Women's Health Clinic,* 113 S. Ct. 753, 767 (1993).

The fact that an organization is donor-supported, or that it pays its employees or agents, simply has no connection at all to the legality of its activities or its liability under RICO. The court of appeals therefore correctly held that respondents had no mercenary purpose that would bring them within RICO.

III. PETITIONERS HAVE FAILED TO ALLEGE ANY PREDICATE ACTS UNDER RICO.

The Seventh Circuit rejected petitioners' RICO claims under 18 U.S.C. § 1962(c) and (d) for failure to satisfy the economic purpose requirement of RICO. Petitioners urge this Court to construe RICO not to require *any* economic purpose whatsoever. Pet. Br. § I. But even if this Court were to do so, this would not help petitioners. Petitioners' complaint fails to state a RICO claim for an additional, wholly independent reason: a complete absence of the necessary "predicate acts."

A respondent—as the prevailing party in the court below—"may rely upon any matter appearing in the record in support of the judgment below." *Blum v. Bacon,* 457 U.S. 132, 137 n.5 (1982). This is true "whether or not that ground was relied upon or even considered by the trial court," *Dandridge v. Williams,* 397 U.S. 471, 475 n.6 (1970), or even if "his argument may involve an attack upon the reasoning of the lower court or an insist-

ence upon matter overlooked or ignored by it." *Id.* (internal quotations marks and citation omitted). If petitioners have not properly pleaded any RICO predicate acts, then there is no RICO cause of action and therefore no need to determine whether the enterprise itself or the predicate acts require an economic purpose. Hence, this issue is a "predicate to an intelligent resolution" of the petitioners' RICO claim. *Cuyler v. Sullivan,* 446 U.S. 335, 342 n.6 (1980) (internal quotation marks and citation omitted).

Each subsection of the RICO statute requires proof of a "pattern of racketeering activity." 18 U.S.C. § 1962(a), (b), (c). A "pattern" of racketeering activity "requires at least two acts of racketeering activity," 18 U.S.C. § 1961(5). The necessary acts of racketeering must in turn come within RICO's definition of "racketeering activity," 18 U.S.C. § 1961(1), which lists the offenses that qualify as predicate acts. Thus, a RICO plaintiff must allege at least two "predicate acts" that fall within the RICO definition of "racketeering activity." Petitioners have failed to do so.

A. Petitioners Cannot Rely Upon Insinuations of "Arson" or "Bombing."

Amicus United States suggests that "arson" and "bombing" might serve as predicate offenses to support petitioners' RICO suit. Brief for United States at 21-22. This suggestion is meritless:

—Petitioners did not allege *any acts* of arson or bombing by respondents in their complaint. In fact, petitioners did not allege arson or bombing *at all,* much less arson or bombing *by respondents.*

—Petitioners did not allege either arson or bombing *as a predicate act.*

—Even in the RICO Case Statement, which lists arson and bombing by non-parties, petitioners did not allege either arson or bombing *as a predicate act.* The only predicate acts alleged are acts of Hobbs Act extortion. J.A. 91, 95-96.

—Petitioners amended their complaint repeatedly but never sought to add arson or bombing as predicate acts. The reason is clear: respondents committed no such acts.

—"Bombing" in any event is not a predicate act under RICO. *See* 18 U.S.C. § 1961(1).

Petitioners therefore cannot salvage their RICO claim by this device.

B. Petitioners' Have Not Alleged Conduct which Constitutes Extortion under the Hobbs Act.

Petitioners rely exclusively upon allegations of "extortion" under the federal Hobbs Act, 18 U.S.C. § 1951. *See* Cplt. ¶¶ 97-98 (J.A. 66-70); RICO Case Statement ¶ 5(a), (f)(1) (J.A. 91, 95-97). Hobbs Act extortion does indeed qualify as a predicate act under RICO. *See* 18 U.S.C. § 1961(1). The conduct petitioners allege, however, does not make out even a *single* instance of extortion under the Hobbs Act, much less the minimum RICO requirement of *two* such acts.

The Hobbs Act, 18 U.S.C. § 1951, prohibits interference with commerce by "extortion," § 1951(a), and defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." § 1951(b)(2). Petitioners' complaint of predicate extortion under the Hobbs Act fails if any one of the essential elements of this statutory offense is lacking. In this case, petitioners' claim is defective for at least three independent reasons: 1) no allegation of "obtaining"; 2) no allegation of "property"; and, (3) no allegation of actual or threatened "force, violence, or fear."

The complaint specifies fifteen supposed predicate acts of extortion. *See* Cplt. ¶ 98 (J.A. 66-70). The following chart lists the factual allegations corresponding to each alleged predicate act, and provides a brief description of the act in question. (Paragraphs refer to the Second Amended Complaint.)

Allegation of predicate act	Corresponding factual allegation	Description of act	
		Status	Substance
1. ¶ 98a	¶ 38	Attempt, conspiracy, commission	rescue blockade [25]
2. 98b	40	Conspiracy	rescue blockades
3. 98c	41	Conspiracy	"unlawful, concerted action"
4. 98d	42	Attempt, commission	"stormed the clinic" and injured two persons
5. 98e	42	Commission	"stormed the clinic," "ransacked a medical procedures room," and destroyed surgical supplies
6. 98f	47	Attempt, conspiracy, commission	rescue blockade
7. 98g	44	Attempt	threat of "reprisals" should administrator of abortion business not quit job
8. 98h	53	Attempt, conspiracy, commission	rescue blockade
9. 98i(1)	59, 63	Attempt, conspiracy, commission	rescue blockades
10. 98i(2)	60	Attempt, conspiracy, commission	rescue blockades

[25] A "rescue blockade" is a sit-in designed to prevent access to an abortion business. *See* Cplt. ¶¶ 38 (J.A. 48), 47 (J.A. 51).

Allegation of predicate act		Corresponding factual allegation	Description of act	
			Status	Substance
11.	98i(3)	61	Attempt, conspiracy, commission	rescue blockades, trespass, and assaults upon police officers
12.	98i(4)	62	Attempt, conspiracy, commission	rescue blockades
13.	98j	64-76	Attempt, conspiracy, commission	theft and concealment of fetal remains; publicizing and conducting funerals and burials of stolen fetuses [26]
14.	98k	69-76	Attempt, conspiracy	disclosure of identity of abortionists responsible for fetal remains; conducting and publicizing fetal funerals
15.	98l	64-76	Attempt, conspiracy	theft, concealment, and transport of fetal remains; threat to disclose identity of abortionists; publicizing and conducting funeral Masses and burials for stolen fetuses [27]

[26] *See supra* note 8.

[27] *See supra* note 8.

These alleged acts do not constitute federal criminal extortion.

1. *The missing elements*

a. *No allegation of "obtaining"*

Violation of the Hobbs Act requires "the *obtaining* of property *from* another . . . ." 18 U.S.C. § 1951(b)(2) (emphasis added). Petitioners have alleged no "obtaining" in this case.

i. *Plain meaning of "obtaining"*

The plain meaning of "obtaining . . . from" includes more than merely making someone "give up" something. Yet the latter is all that petitioners have alleged.

It is a fundamental rule of interpretation to begin with the text of the statute. *United States v. Turkette,* 452 U.S. 576, 580 (1981). Words are to be given their ordinary meaning. *Russello v. United States,* 464 U.S. 16, 21 (1983). The Oxford English Dictionary, vol. 10, 669-70 (2d ed. 1989), traces the development of the uses of "obtain" through the history of the English language. Its principal sense is "to come into the possession or enjoyment of (something) . . . . to acquire [or] get." *Id. Accord Black's Law Dictionary* 972 (5th ed. 1979) ("obtain" means "[t]o get hold of . . .; to get possession of; to procure; to acquire in any way"). "Obtaining . . . from" is not synonymous with "part with," which means "to let go, *give up* [or] surrender." *Oxford English Dictionary,* vol. 11 at 262 (emphasis added). Yet in the present case, petitioners alleged no more than that respondents

> did wrongfully use threatened or actual force, violence or fear to induce or attempt to induce the employees of affected clinics *to give up* their jobs; doctors involved with affected clinics *to give up* their economic right to practice medicine at the plaintiff clinics; patients of affected clinics *to give up* their right to obtain services at the plaintiff clinics; and prospective patients of clinics *to give up* their constitutional right to decide whether and where to ob-

tain medical services free from fear of violence or threatened or actual force.

Cplt. ¶¶ 97, 98(d) (J.A. 66, 67) (emphasis added). Petitioners have not pleaded that respondents (or anyone associated with them) "obtained" anything.

ii. *Meaning of "obtaining" under New York extortion law*

Under New York law—the source of the language of the Hobbs Act—"obtaining" means "gaining," not just denying." *United States v. Enmons,* 410 U.S. 396, 406 n.16 (1973).

The Hobbs Act took its relevant language from the extortion law of the state of New York. *Id.; Evans v. United States,* 112 S. Ct. 1881, 1886 n.9, 1887 (1992). Under New York law, it is well-settled that the crime of extortion requires an unlawful taking. *Enmons,* 410 U.S. at 406 n.16 (under New York statute, "extortion requires an intent to *obtain* that which in justice and equity the party is not entitled to *receive*"; accused must be "actuated by the purpose of *obtaining a financial benefit*" such as "receiv[ing] a payoff") (emphasis added; quoting and citing New York cases). *See People v. Whaley,* 6 Cow. 661, 663 (N.Y. 1827) ("[e]xtortion . . . signifies the taking of money" with corrupt intent) (cited in commentary to Field Code of 1865, § 613 (extortion)). *People v. Ryan,* 232 N.Y. 234, 235, 133 N.E. 572, 573 (1921) (blackmail prosecution) (an intent "to extort" requires an accompanying intent to "gain money or property"; mere threat to injure a business is insufficient). *See also People v. Squillante,* 18 Misc. 2d 561, 564, 185 N.Y.S.2d 357, 361 (Sup. Ct. 1959) (" '[o]btaining of property from another' imports not only that he give up something but that the obtainer receive something"); *United States v. Nedley,* 255 F.2d 350, 355-58 (3d Cir. 1958).[28]

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[28] In *Nedley,* the Third Circuit squarely held, in accord with New York law, that "obtaining" was synonymous with "taking" and that "robbery in the Hobbs Act did *not* extend to "interference by force and violence with . . . lawful dominion and control,"

New York law was codified in the Field Code of 1865, which defined extortion as "[t]he *obtaining of property* from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." FIELD CODE § 613 (1865) (emphasis added). In the commentary to Chapter IV, Section 584 (larceny), the Field Code Commissioners observed:

> Four of the crimes affecting property require to be somewhat carefully distinguished; robbery, larceny, extortion, and embezzlement. . . . *All four include the criminal acquisition of the property of another.* . . . In extortion, there is again a taking. . . . Thus extortion partakes in an inferior degree of the nature of robbery, and embezzlement shares that of larceny.

FIELD CODE, Chapter IV, § 584 com. (emphasis added).

The Field Code, in turn, was one of the sources for the Hobbs Act. *Evans,* 112 S. Ct. at 1886 n.9.

iii. *Meaning of "obtaining" at common law: extortion vs. coercion*

Furthermore, petitioners' theory of "extortion" is completely inconsistent with the distinction at common law—incorporated into the Hobbs Act—between "extortion" and "coercion."

"Coercion" is the criminal compulsion of another, by means of threats, to do or not do something. *See* 31A Am. Jur. 2d *Extortion, Blackmail, and Threats* §§ 49-50 (1989) (coercion as independent offense). Coercion is a creature of statute, much broader then extortion. *Id.* Extortion, by contrast, is limited to the *obtaining of property* by means of threat. *Id.* § 40. The "obtaining" element in the Hobbs Act incorporates this distinction.

It is a familiar "maxim that a statutory term is generally presumed to have its common-law meaning." *Taylor v. United States,* 495 U.S. 575, 592 (1990) (quoted in *Evans v. United States,* 112 S. Ct. 1881, 1885 (1992)). As this Court reaffirmed in *Evans,*

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since no "taking" or no "intent to steal" could be shown. 255 F.2d at 354-57.

> "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."

Id. at 1885 (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

In *Evans*, this Court explicitly applied this rule to the terms of the Hobbs Act: "our construction of the statute is informed by the common-law tradition from which the term of art was drawn and understood." 112 S. Ct. at 1889. This "common-law tradition" demonstrates the flaw in petitioners' attempt to obliterate the distinction between extortion and coercion.

(a). *Extortion at common law*

Although the common law definition varied from treatise to treatise, extortion unquestionably was a *property* offense. Blackstone [29] described extortion as "an abuse of public justice, which consists in an officer's unlawfully *taking*, by colour of his office, from any man, *any money or thing of value*, that is not due to him, or more than is due or before it is due." 4 W. Blackstone, *Commentaries* 141 (1769) (emphasis added). In another influential treatise, Coke opined, "[e]xtortion, in its proper sense, is a great misprision, by wresting or unlawfully *taking* by any officer, by colour of his office, *any money or valuable thing* . . . either that is not due, or more than is due, or before it

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[29] "The definition of common law extortion that writers on the Hobbs Act most frequently cite is Blackstone's . . . ." Lindgren, *The Elusive Distinction Between Bribery and Extortion; from the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815, 862 (1988).

be due . . . ." 3 E. Coke, *First Institute* 584 (J. Thomas ed. 1826) (emphasis added). Hawkins[30] stated,

> [E]xtortion in a large sense signifies any oppression under colour of right; but that in a strict sense, it signifies the *taking of money* by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due.

W. Hawkins, *A Treatise of the Pleas of the Crown* 316 (6th ed. 1788) (emphasis added).

In sum, the common law definition of extortion required the *acquisition of property*. The Hobbs Act, by employing the term "obtaining" from common law, New York law, and the Field Code, incorporated this same element.

(b). *Statutory distinction between extortion and coercion*

The Model Penal Code maintained the distinction between the (originally common-law) crime of extortion and the (originally statutory) crime of coercion. Section 212.5 "prohibits specified categories of threats made with the purpose of unlawfully *restricting another's freedom of action* to his detriment." MODEL PENAL CODE § 212.5 cmt. 2 at 264 (1980) (emphasis added).[31] Section 223.4, however, "deals with situations where threat . . . is the method employed to *deprive the victim of his property*." *Id.* § 223.4 cmt. 1 at 201 (emphasis added). The obtaining of property distinguishes extortion from coercion, as

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[30] "Hawkins's definition of extortion was cited, paraphrased, or followed by the *Crown Circuit Companion*, Mathew Bacon in *A New Abridgement of the Law*, William Russell in *A Treatise on Crimes and Misdemeanors*, and Francis Wharton in his influential American treatise, *A Treatise on the Criminal Law*." Lindgren, *supra* note 29, at 865 (footnotes omitted).

[31] "The word 'unlawfully' means that the actor must intend to coerce conduct that he has no legal right to require . . . . The phrase 'freedom of action' is intended to include anything which the other person does not wish to do or to refrain from doing." *Id.* at 265.

coercion involves the restriction of another's freedom of action by threat.

Many states follow the Model Penal Code and distinguish extortion and coercion by categorizing them as separate statutory offenses.[32] A second group of states recognize only the crime of extortion, not coercion.[33] Other states combine the two offenses under one heading.[34]

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[32] *See* ALA. CODE §§ 13A-8-13, 13A-6-25 (1982); ALASKA STAT. §§ 11.41.520, 11.41.530 (1989); ARK. CODE ANN. §§ 5-36-103(a)(2), 5-13-208 (Michie 1987 & Supp. 1991); COLO. REV. STAT. ANN. § 18-3-207 (coercion labelled extortion), § 18-4-401 (consolidated theft) (West 1990); DEL CODE ANN. tit 11, §§ 846, 791 (Supp. 1992); MISS. CODE ANN. § 97-3-81 (extortion labelled robbery), § 97-3-87 (coercion labelled whitecapping) (1973); MONT. CODE ANN. §§ 45-6-301(2), 45-5-203 (1991); NEV. REV. STAT. ANN. §§ 205.320, 207.190 (Michie 1992); N.J. STAT. ANN. §§ 2C:20-5, 2C:13-5 (West 1982); N.Y. PENAL LAW §§ 155.05(2)(e) (McKinney 1988), 135.60 (McKinney 1987); N.D. CENT CODE §§ 12.1-23-02(2), 12.1-17-06 (1985); OHIO REV. CODE ANN. §§ 2905.11, 2905.12 (Anderson 1993); OR. REV. STAT. §§ 164.075, 163.275 (1990); 18 PA. CONS. STAT. ANN. §§ 3923, 2906 (Purdon 1983); WASH. REV. CODE ANN. §§ 9A.56.110, 9A.36.070 (1988).

[33] *See* ARIZ. REV. STAT. ANN. § 13-1804 (1989); CAL. PENAL CODE § 518 (1988); CONN. GEN. STAT. ANN. § 53a-119(5) (West Supp. 1993); GA. CODE ANN. § 16-8-16 (1992); IDAHO CODE § 18-2403(2)(e) (1987); ILL. ANN. STAT. ch. 38, para. 16-1(a)(3) (Smith-Hurd Supp. 1992); IND. CODE ANN. §§ 35-45-2-1, 35-43-4-1(b)(7) & 35-43-4-2 (Burns Supp. 1992); IOWA CODE ANN. § 711.4 (West 1979); KY. REV. STAT. ANN. § 514.080 (Baldwin 1984 & Supp. 1992); LA. REV. STAT. ANN. § 14:66 (West 1986); ME. REV. STAT. ANN. tit. 17-A, § 355 (1983); MD. CRIM. LAW CODE ANN. § 562B (1992); MO. ANN. STAT. § 570.030 (Vernon Supp. 1993); NEB. REV. STAT. § 28-513 (1989); N.H. REV. STAT. ANN. § 637:5 (1986); N.C. GEN. STAT. § 14-118.4 (1986); S.C. CODE ANN. § 16-17-640 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 22-30A-4 (1988); TEX. PENAL CODE ANN. § 31.03 (West 1989); UTAH CODE ANN. § 76-6-406 (1990); VA. CODE ANN. § 18.2-59 (1988); W. VA. CODE § 61-2-13 (1992).

[34] *See* FLA. STAT. ANN. § 836.05 (West 1976); HAW. REV. STAT. § 707-764 (1988); MASS. GEN. LAWS ANN. ch. 265, § 25 (West 1990); MICH. COMP. LAWS ANN. § 750.213 (West 1991); MINN. STAT. ANN. § 609.27 (West 1987); N.M. STAT. ANN. § 30-16-9

Petitioners fail to recognize coercion as a separate offense. Yet "[t]he distinction is not trivial: . . . it is of the essence of extortion—not only in New York law but, more importantly, in the law generally—that one compel another to surrender *property*." *United States v. Private Sanitation Industry Ass'n*, 793 F. Supp. 1114, 1132 (E.D.N.Y. 1992) (emphasis in original) (citing *United States v. Nardello*, 393 U.S. 286, 296 (1969)).

Petitioners' allegations of extortion are limited to claims that abortion businesses, doctors or patients were deprived of the ability to exercise certain rights. But "to deprive" is simply not the same as "to obtain from." Respondents were not business competitors of the petitioners or their employees. They stood to gain nothing by the reduction in the petitioners' business. Even assuming, *arguendo*, that abortion businesses lost "property" because of respondents, *but see infra* § III(B), neither the respondents nor anyone associated with them *obtained* that "property." Nor did any third party gain "property." Thus, the crime of "extortion" simply does not fit the alleged conduct. Whatever else respondents might have been, they were not "extortionists." [35]

(1984); R.I. GEN. LAWS § 11-42-2 (Supp. 1992); TENN. CODE ANN. § 39-14-112 (1991); VT. STAT. ANN. tit. 13, § 1701 (Supp. 1992); WIS. STAT. ANN. § 943.30 (West 1982); WYO. STAT. § 6-2-402 (1988). *Cf.* KAN. STAT. ANN. §§ 21-3701(c) (theft by threat), 21-3428 (coercion and extortion together) (1988); OKLA. STAT. ANN. tit. 21, §§ 1481 (extortion), 1488 (coercion and extortion together under blackmail) (West 1983).

[35] The Third Circuit holding in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), that no economic benefit or motivation is necessary in pleading and proving a Hobbs Act violation, is clearly wrong. None of the decisions it cited supports its holding. *United States v. Cerelli*, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980), merely held that the extortionist need not obtain the property himself—a political party may be the recipient of the extorted contributions. *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975), held that a religious purpose does not preclude a finding of extortion where money is taken. Finally, *United*

A defendant may "obtain" property for purposes of the Hobbs Act either by *personally* receiving a direct payment from the victim or by obtaining property for *another* person. *United States v. Green*, 350 U.S. 415 (1956). In the case at bar, however, petitioners have alleged neither alternative. Petitioners have not alleged that respondents themselves either received or sought any benefit from any of the alleged victims of extortion. (The only "benefits" petitioners allege are donations and salaries which come, not from the alleged victims, but from independent sources.) Nor have petitioners alleged any attempt to coerce the transfer of any property to third parties.[38] Therefore respondents cannot, in any reasonable sense of the word, be guilty of "obtaining" any property.

b. *No allegation of "property"*

Violation of the Hobbs Act requires "the obtaining of *property*," 18 U.S.C. § 1951(b)(2) (emphasis added). Petitioners' complaint does not satisfy this requirement.

Petitioners identify, *inter alia*, the following supposed "property" extorted from the alleged victims: from patients, the "right to obtain services" at facilities that pro-

---

States v. Anderson, 716 F.2d 446 (7th Cir. 1983), dealt not with the "obtaining from" element of extortion, but with the failure to give kidnapping instructions. The record, however, included evidence that defendant had extorted $300 from the victim. *Id.* at 477. Curiously, the Third Circuit failed to cite its own controlling precedent recognizing that extortion under the Hobbs Act is a "larceny-type offense." *United States v. Sweeney*, 262 F.2d 272, 275 (3d Cir. 1959) (citing *United States v. Nedley*, 255 F.2d 350 (3d Cir. 1958)). *McMonagle*, in short, is unpersuasive. The court below referred to *McMonagle's* holding in passing, but without independently addressing this issue.

[38] Petitioners have alleged that certain "co-conspirators" themselves caused *damage* to the property of some abortion businesses. But vandalism alone—even intentional vandalism—is not extortion. Nor have petitioners themselves ventured so far as to allege that the property so damaged constitutes the property allegedly "obtained" by respondents. *See* Cplt. ¶ 97 (J.A. 66) (describing "property" allegedly extorted).

vide abortions; and from prospective patients, the "constitutional right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force." Cplt. ¶ 97 (J.A. 66).[37] These abstract "rights" of uncertain legal status do not constitute "property" for purposes of the Hobbs Act.

Any unlawful conduct, whether a tort, a breach of contract, or even a parking violation, will interfere to some degree with another person's liberty to do as he pleases. But the Hobbs Act forbids the wrongful obtaining of *property*, not the wrongful denial of *liberty*. To treat "rights" as "property" under the Hobbs Act would be to remove all limits whatsoever to the kind of injury necessary to rise to the level of federal criminal extortion.

This Court rejected a similar attempt to expand the concept of "property" beyond all meaning in the context of the federal mail fraud statute. *See McNally v. United States*, 483 U.S. 350 (1987). The mail fraud statute prohibited use of the mails for "obtaining money or property" by fraud. 483 U.S. at 352 n.1. In *McNally*, the government charged the defendant with defrauding Kentucky citizens "of their right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud . . . ." *Id.* at 354 n.4 (trial court's instruction to jury). This Court recognized an

[37] Petitioners also identified the following supposed "property" extorted: from employees, "jobs"; from doctors, the "economic right to practice medicine" at facilities that provide abortions. *Id.* To the extent that these allegations refer to the general "freedom . . . to engage in any of the common occupations of life," *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)), the allegations describe a *liberty* interest, not a property right. While employers can have property interests in continued employment *vis-a-vis* the employer, the respondents in this case neither employ abortion business staff or even seek their jobs for themselves. Nor have petitioners claimed that respondents sought to induce abortion businesses to fire their staff.

obvious difference between "property rights" and "the intangible right of the citizenry to good government." *Id.* at 356. Indeed, this distinction was so clear that the Court considered that the only "arguable" way of saving the prosecution would be to construe the mail fraud statute so as to dispense entirely with "the money-or-property requirement" for certain kinds of fraudulent schemes. *Id.* at 358. The Court refused to remove this statutory limitation: "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read [the mail fraud statute] as limited in scope to the protection of property rights." *Id.* at 360.

Acceptance of petitioners' strained characterization of abstract "rights" as property would likewise leave the boundaries of the Hobbs Act highly ambiguous and would put the federal government in the business of enforcing order in domestic social movements. Did the civil rights activists of the 1960's extort owners of diners of "property" when they obstructed the owners' "right to serve only the customers they chose"? Did these activists extort white bus passengers of their "property" by making these passengers give up their "right to sit in the front of the bus"? Such convoluted abstractions do not constitute "property" under the Hobbs Act.

To ~~be sure, a pro~~perty right need not be tangible. *Carpenter v. United States*, 484 U.S. 19, 25-27 (1987) (mail fraud statutes apply to wrongful obtaining of intangible property). But "intangible property" does not equate with "intangible rights." A liberty interest such as the "right to obtain services" or the "constitutional right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force" is, in the words of *Carpenter*, "an interest too ethereal in itself to fall within the protection" of the "property" concept, *id.* at 25.

c. *No allegation of "force, violence, or fear"*

Conduct typical of civil disobedience—sit-ins, pickets, vehement rhetoric—does not constitute "force, violence, or fear" under the Hobbs Act. Petitioners have alleged no more than conduct of this sort;[38] hence, there can be no predicate extortion. *Accord Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 102 (2d Cir. 1990) ("it would be difficult to construe the [anti-abortion rescuers'] activities as described in the complaint, consisting of resistance to police efforts to clear protestors from the [abortion business] . . ., as the 'wrongful use of actual or threatened force, violence or fear' within the meaning of section 1951(b)").

In the case at bar, petitioners have sought to characterize a quintessentially social, moral, and political battle as "extortion." This semantic legal endeavor is flawed not only as a matter of statutory construction, but also as a fundamental matter of jurisprudence. As the sponsor of the Hobbs Act noted, the words "robbery" and "extortion" "have been construed a thousand times by the courts. Everybody knows what they mean." 91 Cong. Rec. 11912 (1945) (quoted in *United States v. Culbert*, 435 U.S. 371, 378 (1978)). Petitioners' artificial and unbounded construction of the Hobbs Act, like the prosecutor's attempted expansive reading of that same Act in *McCormick v. United States*, 111 S. Ct. 1807, 1816 (1991), is "an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent . . . ."

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[38] Arson and bombing would represent examples of force or violence; however, petitioners have alleged no such predicate acts. *Supra* § III(A). Petitioners have alleged a solitary incident of apparent assault by persons who are not defendants in this case. Cplt. ¶ 42 (J.A. 50). But petitioners have alleged no connection to respondents that would support legal liability for this isolated incident. One person "certainly . . . cannot" be held liable for the acts of another "simply because both shared certain goals." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 925 n.69 (1982) (citation omitted).

For forty years after the passage of the Hobbs Act of 1948, not a single reported decision suggested that the pursuit of social, moral, or political goals through pressure tactics—including lawbreaking in the form of trespass, obstruction, mass picketing, and incidental scuffling—constitutes federal criminal extortion. The isolated and aberrant decision in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), cannot have singlehandedly revolutionized American jurisprudence.

Civil disobedience and social or political pressure tactics are "as American as apple pie," and characterizing ideological movements as extortionate simply because of the use of these traditional methods would move this country precisely in the direction of totalitarian oppression so recently abandoned in the former Soviet Union. The theory of petitioners' complaint would make a racketeer and an extortionist out of everyone from Mohandas Gandhi, to Martin Luther King, Jr., to the temperance activists of the Nineteenth Century (*see* decision below, 968 F.2d at 619-20), to the leaders of the Boston Tea Party. Petitioners' construction of RICO and the Hobbs Act would distort these statutes into weapons for combatting anti-nuclear protestors, animal rights activists, and opponents of apartheid. Indeed, some of petitioners' amici not only recognize but positively *welcome* this prospect. *See* Brief of the American Medical Ass'n et al. at 3-4, 22-23. But as the Ninth Circuit declared in *United States v. Caldes*, 457 F.2d 74 (9th Cir. 1972) (cited with approval in *United States v. Enmons*, 410 U.S. 396, 409 (1973)), "it appears to us that acts of vandalism of the type committed by these [defendants] would be more properly and suitably prosecuted in the state courts and it is doubtful if Congress intended by Section 1951 to elevate this type of conduct to the level of the federal court." 457 F.2d at 79 (citing *United States v. Bass*, 404 U.S. 336 (1971)).

2. *The rules of statutory construction*

Essentially, petitioners' theory of extortion is that any garden-variety political protest aimed at an industry causes extortion to the extent that it adversely influences business and consumers. If businesses sell less, if consumers buy less, if fewer employees are employed, that is "extortion" of each of them. The extorter need *obtain* nothing; it is sufficient if the businesses, consumers, or employees are deprived of (or "give up") something. Furthermore, under this theory, the very nature of protest supplies the element of "actual or threatened force or fear." The theory profoundly contradicts several well-established norms of statutory construction.

a. *Avoiding constitutional difficulties*

It is a fundamental rule of statutory construction that legislation ought not, if a reasonable alternative is present, be interpreted in a manner that raises constitutional difficulties. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988); *New York v. United States,* 112 S. Ct. 2408, 2425 (1992). This rule of construction mandates fidelity to all of the elements of Hobbs Act extortion—including the elements missing from petitioners' complaint.

The right to free speech shelters a broad range of expressive activity, including forms of communication which many people might find offensive, coercive, and disruptive. *E.g., Texas v. Johnson,* 491 U.S. 397 (1989) (flag burning); *City of Houston v. Hill,* 482 U.S. 451 (1987) (confronting police officer); *Cohen v. California,* 403 U.S. 15 (1971) (profanity); *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1982) (boycotts enforced through public embarrassment); *Cantwell v. Connecticut,* 310 U.S. 296 (1940) (attacking religious beliefs). Even when protest activity inflicts economic injury, it does not thereby become unlawful. *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1981); *Thornhill v. Alabama,* 310 U.S. 88 (1940).

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The role of civil litigation to remedy unlawful conduct in the context of group protests is therefore sharply limited: "precision of regulation" is essential.[39] *Claiborne Hardware*, 458 U.S. at 916 (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)). In order to establish civil liability, a plaintiff must show that each individual defendant had a specific intent to engage in unlawful activity; furthermore, legal remedies are only permissible for those losses that result from *unlawful* conduct. 458 U.S. at 918-21.

Petitioners' attempt to equate demonstrations with extortion does not meet the "heavy" burden of precision the first amendment imposes in this sensitive area in order to safeguard expressive "constitutionally protected activity." *Id.* at 933-34. This Court should therefore reject petitioners' perversely expansive reading of the Hobbs Act.

b. *Federalism*

Second, this Court is loathe to interpret federal statutes in ways that "upset the usual balance of federal and state powers." *New York v. United States*, 112 S. Ct. 2408, 2425 (1992). *See generally Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399-2401 (1991). "[W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Bass*, 404 U.S. 336, 349 (1971). This rule militates against turning the Hobbs Act into a device for federalizing such traditional state offenses as trespass, obstruction of public passage, and destruction of private property. *See United States v. Staszcuk*, 517 F.2d 53, 55 (7th Cir.) (en banc) (per Stevens, J.) (the "extraordinary growth of federal criminal litigation poses a serious threat to the quality of

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[39] *See generally* Califa, *RICO Threatens Civil Liberties*, 43 Vand. L. Rev. 805, 806 (1990) ("using RICO in ideological disputes is inappropriate and harmful because it results in the chilling of First Amendment rights").

federal justice; moreover, this growth may not only reflect but contribute to the continuing transfer of power from the several states to the national government. . . . [W]e have no desire to accelerate this trend unnecessarily"), *cert. denied,* 423 U.S. 837 (1975).

This Court expressed the same caution in refusing to apply the Hobbs Act to unlawful conduct incident to a labor strike:

> [It] would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.

United States v. Enmons, 410 U.S. 396, 411 (1973) (citations omitted). These same principles govern the case at bar.

c. *Rule of lenity*

Third, any "uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Kozminski,* 487 U.S. 931, 952 (1988) (and cases cited). To accept petitioners' unprecedented expansion of the Hobbs Act would be to stand this rule on its head, as this would require both creating ambiguity over whether the statutory terms mean what they say, and then resolving that ambiguity in favor of an extremely broad interpretation.

"The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally,* 483 U.S. at 359-60 (citations omitted). This rule serves

many important purposes: "to promote fair notice to those subject to criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts," *Kozminski*, 487 U.S. at 952.

As a criminal law, the Hobbs Act is subject to this rule of strict construction. *United States v. Enmons*, 410 U.S. 396, 411 (1973); *McCormick v. United States*, 111 S. Ct. 1807, 1816 (1991). This Court must therefore reject petitioners' novel and highly strained construction of federal criminal "extortion."

* * * *

Petitioners have failed to allege facts that would constitute even a single predicate act of federal criminal extortion. Whereas the RICO statute requires at least *two* or more such predicate acts, petitioners' complaint is fatally deficient. It follows that there is simply no occasion even to reach the "economic purpose" question under RICO.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

KEITH A. FOURNIER
AMERICAN CENTER FOR LAW AND JUSTICE
1000 Centerville Turnpike
Virginia Beach, VA 23464
(804) 523-7570

VINCENT P. MCCARTHY
8 South Main Street
New Milford, CT 06776
(203) 355-0923

JAY ALAN SEKULOW
(Counsel of Record)
WALTER M. WEBER
AMERICAN CENTER FOR LAW AND JUSTICE
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, D.C. 20007
(202) 337-2273

Attorneys for Respondents Randall A. Terry, Project Life, and Operation Rescue

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In The

Supreme Court of the United States

October Term, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., DELAWARE WOMEN'S HEALTH ORGANIZATION, and SUMMIT WOMEN'S HEALTH ORGANIZATION,

Petitioners,

v.

JOSEPH M. SCHEIDLER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS JOSEPH M. SCHEIDLER, ANDREW SCHOLBERG, AND THE PRO-LIFE ACTION LEAGUE, INC.

THOMAS BREJCHA*
ABRAMSON & FOX
One East Wacker Drive
Suite 3800
Chicago, Illinois 60601
(312) 644-8500

ROBERT S. HARLIB
105 W. Madison St.
Suite 300
Chicago, Illinois 60602
(312) 236-6605

CLARKE D. FORSYTHE
Americans United for Life
343 S. Dearborn St. #1804
Chicago, Illinois 60604
(312) 786-9494

Counsel for Respondents

*Counsel of Record

September 29, 1993

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QUESTIONS PRESENTED FOR REVIEW

Various organizations sought a nation-wide injunction and damages against persons and organizations who engaged in political and social protests, including alleged acts of trespass and vandalism, against abortion and abortion clinics. The National Organization for Women (NOW) based its claim on the Sherman and Clayton Acts, 15 U.S.C. §§1, 26, while two abortion clinics brought claims under the Sherman and Clayton Acts, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1962, and pendent state claims. For almost five years, Plaintiffs engaged in voluminous discovery and ultimately filed First and Second Amended Complaints as well as a RICO Case Statement. The District Court then dismissed the Complaint. The Court of Appeals affirmed. This Court granted the Petition for Certiorari limited to RICO. Restated, the issues are:

1. Was the Second Amended RICO Complaint, alleging extortion against protestors, properly dismissed, where the designated "enterprise" and the alleged "racketeering activity" had a political or social, but not a commercial, dimension?

2. Was the Complaint properly dismissed after nearly five years of litigation and discovery, where the Complaint and the RICO Case Statement showed that a RICO claim or conspiracy had not been specifically alleged?

QUESTIONS PRESENTED FOR REVIEW – Continued

3. Was the Complaint properly dismissed, where Petitioners lacked standing to pursue their RICO claims against Respondents and failed to allege Hobbs Act extortion or any other predicate acts under RICO?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, in pertinent part, provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

18 U.S.C. §1961(3) provides:

> "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

Other statutory provisions are reproduced in Petitioners' Brief (Pet. Br. at 1-3).

STATEMENT OF THE CASE

1. In 1985, Respondent Joseph Scheidler, the founder of the Pro-Life Action League, published *Closed: 99 Ways to Stop Abortion* ("Closed").[1] *Closed* is the centerpiece of this litigation. In it, Scheidler vigorously advocated "a collection of methods that can be used, and that have been used successfully, to stop abortions." *Id.* at 17. They included such constitutionally protected methods as demonstrations and picketing. In chapter 81, entitled "Violence: Why it won't work," Scheidler, with equal vigor, opposed violence – defined as "a direct, physical attack on some type of facility or the personnel who work there." *Id.* at 277. He opposed it on grounds of principle and prudence:

> All of the activist pro-lifers the Pro-Life Action League works with concur with the League's position against violence and its program of *non-violent direct action*. * * * The use of violence could damage the reputation of pro-life activists, while undermining traditional non-violent methods. The

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[1] Copies of *Closed* have been lodged with the Clerk. The book is referred to in the Complaint (¶¶28-29, 77) and in the RICO Case Statement (¶6 (2); J.A. 103), and it was made part of the Record (R.109, Exhibit).

> use of violence might reinforce the erroneous belief that the end justifies the means, and that evil can be overcome by evil. *Id.* at 278 (emphasis in original).

Scheidler acknowledged that he had contacted individuals who had been implicated in violence against abortion clinics, yet he wrote that "we advise pro-lifers not to resort to violent tactics, but to save lives and stop abortions through non-violent direct action. * * * [W]e plan to win without resorting to violence." *Id.* at 279.[2]

2. In June, 1986, Petitioners filed a Complaint under the antitrust laws (Sherman Act, 15 U.S.C. §1, and the Clayton Act, 15 U.S.C. §26) in the District of Delaware against Respondents and other Defendants (No. 86 C 263).[3] The suit was voluntarily dismissed. Petitioners refiled their Complaint in the Northern District of Illinois on October 17, 1986 (No. 86 C 7888). Petitioners sought nation-wide declaratory and injunctive relief. No class was certified (R.61, 73, 76). Motions to dismiss were filed and denied (R.42).

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[2] *See generally*, I W. *Blackstone, Commentaries on the Laws of England* 125 (1765) (natural rights basis of right to life); S. Oates, *Let the Trumpet Sound: The Life of Martin Luther King, Jr.* 216 (1985) (purpose of direct action).

[3] Plaintiffs originally included NOW, the Delaware Women's Health Organization ("DWHO") and the Ladies Center of Pensacola. The Ladies Center was dismissed from the case. Petitioner Summit Women's Health Organization ("SWHO") was added in the First Amended Complaint. For purposes of brevity, Respondents refer to Plaintiffs as "Petitioners" throughout this Brief.

Joseph Scheidler and the Pro-Life Action League, Inc., were among the original Defendants. Timothy Murphy and Andrew Scholberg were added as Defendants in amended Complaints. For purposes of brevity, "Respondents" refers to Joseph Scheidler, the Prolife Action League, Inc., and Andrew Scholberg, unless otherwise specifically indicated. The Pro-Life Action League, Inc., has no parent company or subsidiary.

Certain defendants, including John Ryan and the Pro-Life Direct Action League, were named as defendants only in the antitrust count and will not be filing briefs in this Court due to the limited grant of certiorari.

3. For several years, Petitioners pursued discovery nation-wide, reviewing tapes, files, and correspondence of Respondents and others. Depositions were taken in cities across the country – Chicago, Illinois, Fargo, North Dakota, Fort Wayne, Indiana, St. Louis, Missouri, Durham, North Carolina, Jacksonville, Florida, and Washington, D.C. At least thirteen depositions, including those of Joseph Scheidler, Timothy Murphy, Andrew Scholberg, Randall Terry, Monica Migliorino, Conrad Wojnar, and John Ryan, were taken either before Petitioners filed their Second Amended Complaint in September, 1989, (R.236) or before they filed their RICO Case Statement in March, 1991 (R.469).

4. Petitioners filed a First Amended Complaint on February 2, 1989, which added alleged violations of RICO, 18 U.S.C. §1962, and prayers for treble damages (R.155). The First Amended Complaint also added defendants, including Terry, Scholberg, Murphy, and Vital-Med Laboratories, new conspiracies, and three pendent state theories of recovery. The conspiracy allegations were so broadly drawn that Petitioners later claimed that they embraced hundreds or thousands of co-conspirators (¶3; J.A. 89).

5. Petitioners filed a Second Amended Complaint on September 22, 1989 ("Complaint") (R.236). Petitioners alleged that Respondents conspired to "drive every clinic in the United States . . . out of business" (¶26) and that they had engaged in "unlawful, concerted action, including repeated acts of trespass, extortion and vandalism directed at women's health centers. . . . " (¶27). They also alleged that Respondents and other Defendants, and one or more employees of Defendant Vital-Med, "conspired to steal fetal remains located in Vital-Med's research laboratory in Northbrook, Illinois," (¶64) stole some 4,000 specimens over a period of 10 months, and conspired to "use the specimens as part of their drive to disrupt the operations of health clinics generally" (*id.*) through a media campaign. Among these alleged uses were "actions designed to intimidate and harass clinics by focusing attention on the stolen specimens," (¶37) including "highly publicized" funeral masses and burials (¶ 0). Petitioners alleged that the purpose of Respondents' actions

was "to force all clinics that perform abortions out of business and to eliminate the choice of abortion for women who are pregnant." (¶85) Petitioners asked for declaratory relief against Respondents who were alleged to "have violated the rights of" the clinics and their patients to be free of restraints of trade, and for injunctive relief to prohibit Respondents from "carrying out a concerted effort to drive women's health centers . . . out of business" and "using unlawful means to drive women's health centers . . . out of business." (¶93)[4]

6. The Complaint and RICO Case Statement make allegations of trespass, disorderly conduct, and arrests for such conduct, against Scheidler (¶¶46,60; J.A. 51, 56, 131, 146), Murphy (¶55; J.A. 126-30), and Scholberg (¶60; J.A. 148-152). Beyond that, the Complaint alleges that Scheidler

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[4] Petitioners and their Amici also make reference to "terrorism" (Pet. Br. 3, 7, 8, 9, 25, 27, and 34) and "murder" (*id.* at 5 n.3 and 9; Amicus Br. of State of New York, et al., 9 n.19). The record, however, contains no support for such epithets or arguments rooted in guilt by association. The "murder" is not only outside the record, but also unrelated to Respondents.

If, as Petitioners contend (Pet. Br. 5 n.3), Respondents must take responsibility, based on their pro-life stance, for the death of Dr. David Gunn, then Charles Evers who participated in the civil rights boycott that this Court reviewed in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), was responsible for the shots that were fired at houses, the brick that was thrown through the windshield, the slashed tires, and the threatening phone call. *Id.* at 904-05. Neither vicarious attribution of responsibility is appropriate. *Id.* at 908 (right to associate not lost because other members of group engage in unprotected conduct); *Scales v. United States*, 367 U.S. 203, 224-29 (1961) ("guilt is personal"); *United States v. Bright*, 630 F.2d 804, 834 (5th Cir. 1980) ("not responsible for acts of . . . [RICO] co-conspirators . . . beyond the [agreed] goals"). Finally, no facts well-pled in the Second Amended Complaint or set out in the RICO Case Statement warrant linking these Respondents to "arson," "kidnapping" or "firebombing," as Petitioner's argue (Pet. Br. 4, 6, and 32). Conclusory allegations of conspiracy are insufficient. *See, e.g., Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25-26 & n.4 (2d Cir. 1990). Accordingly, this appeal is about social and political protest – it is not about "terrorism," "murder," "arson," "kidnapping" or "firebombing."

in April, 1986 conspired to steal, store, and ship "fetal remains" from Respondent Vital Med (¶¶37,64, 98(j)). The RICO Case Statement makes conclusory allegations that Scheidler "[c]onspired with others to firebomb clinics" in Anaheim, California in June, 1980 (J.A. 138) and "conspired" to enter a Pensacola Clinic in March, 1986, in which he intended to "destroy equipment" (J.A. 142), and for which he was allegedly arrested for "burglary." Other individuals are named, not in the Complaint, but in Exhibit B of the RICO Case Statement, as "co-conspirators," who allegedly participated in "arson," "kidnapping," and "firebombing." (J.A. 161-64, 166, 169, 171-72). No facts, however, are set out that show that these individuals acted in concert with Respondents.

7. Count I was an antitrust claim. NOW was only an antitrust Plaintiff. Count II was a RICO §1962(a) claim. The RICO claim was brought by the abortion clinics – DWHO and SWHO – as class actions. Petitioners alleged that Respondents formed enterprises "with common purposes, including driving all clinics that provide abortion services out of business" (¶¶95-96). The RICO predicate act alleged was Hobbs Act extortion (18 U.S.C. §1951). The Complaint described the "extortion" as follows:

> Defendants conspired to, attempted to or did wrongfully use threatened or actual force, violence or fear to induce or attempt to induce the employees of affected clinics *to give up* their jobs; doctors involved with affected clinics *to give up* their economic right to practice medicine at the plaintiff clinics; patients of affected clinics *to give up* their right to obtain services at the plaintiff clinics; and prospective patients of clinics *to give up* their constitutional right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force.

¶97 (emphasis supplied). *See also* ¶98. Petitioners made no allegations that any Defendant, or any co-conspirator factually linked to a Respondent, obtained, or attempted to obtain, any property from any clinic, doctor, or patient.

8. Counts III and IV were RICO Section 1962(c) and (d) claims. Petitioners alleged that Respondents were associated with one of the enterprises, Pro-Life Action Network ("PLAN"), and "participated in PLAN's affairs through a pattern of racketeering activity" (¶109), *i.e.*, the Hobbs Act extortion alleged in ¶¶97-98. Petitioners alleged that Respondents conspired to "use the income they received from a pattern of racketeering activity . . . to establish or operate PLAN" and "agreed to the commission of the extortionate acts from which the above-mentioned income would derive" (¶112). The remaining counts alleged state theories.

9. On August 29, 1990, Respondents filed a Motion to Dismiss the Second Amended Complaint under Fed. Rules of Civ. Pro. ("FRCP") Rule 12(b)(6) or, in the alternative, for a more definite statement under FRCP 12(e) (R.335). Respondents also made a motion to require Petitioners to file a RICO Case Statement under FRCP 16 (R.360).

10. On February 4, 1991, the District Court ordered Petitioners to file a RICO Case Statement, which had to "include the facts the plaintiffs [were] relying upon to initiate each RICO claim as a result of the 'reasonable inquiry' required by Fed. R. Civ. P. 11" (introductory ¶; J.A. 82; R.430).

11. On March 18, 1991, Petitioners filed their RICO Case Statement. While the Complaint alleged acts of trespass, vandalism, assault, battery, and theft by Respondents, other Defendants, or unnamed co-conspirators (¶¶2, 27, 42, 46-47, 49-50, 61, 64, 67, 74, 97-98), it did not refer to "bombing" or "arson" by any Respondent, other Defendants, or their "co-conspirators." Only in the RICO Case Statement, filed eighteen months after the Second Amended Complaint, does a reference to alleged acts of "bombing" or "arson" first appear, and the reference indicates that they are allegedly part of "the pattern of extortionate acts." (¶2; J.A. 88). Nevertheless, Petitioner did not "list the specific [federal or state extortion, bombing, or arson] statutes which were allegedly violated,"

as required by the Order of February 4, 1991.[5] Instead, Petitioners characterized these acts as "violat[ions] of the Hobbs Act, 18 U.S.C. §1951." (¶¶5(a), (p), J.A. 91, 95-97)[6] The Complaint and the RICO Case Statement, however, are barren of facts that "state in detail and with specificity" what the plaintiffs "reli[ed] upon to initiate" their "RICO claim" or show conduct by any Respondent of "bombing" or "arson" or their agreement to such acts as part of a conspiracy, as required by the Order of February 4, 1991.

12. On May 28, 1991, the District Court granted Respondents' Motion to Dismiss, holding that Petitioners failed to state a claim under either the antitrust laws or RICO. 765 F. Supp. 937, 941. Petitioners did not seek to open the judgment under FRCP 59(e) or 60(b) to request leave to amend under FRCP 15(a) after their action was dismissed to cure any possible defect in their Complaint, including a failure to allege an economic dimension or additional "racketeering activity" beyond "extortion." Instead, Petitioners, standing on their Complaint, appealed the dismissal.

13. The Court of Appeals affirmed. 968 F.2d 612. Petitioners' petition for rehearing was denied. (Pet.App. G-2) Petitioners filed a petition for certiorari on November 2, 1992. On June 14, 1993, this Court granted certiorari limited to Question 1 (the RICO question). 113 S.Ct. 2958 (1993).

SUMMARY OF THE ARGUMENT

Contrary to our nation's fundamental commitment to the freedoms protected by the First Amendment, this litigation was designed to gain a federal forum to bankrupt a nation-

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[5] Under federal law, "bombing" or "arson" are not "racketeering activity" under 18 U.S.C. §1961. "Arson" in violation of state law is a "racketeering activity." *Id.* "Bombing" is also not a predicate state offense under "racketeering activity." *Id.*

[6] The Government's suggestion that Petitioners pled "arson" or "bombing" as independent predicate acts (Gov. Br. 3, 21-22) misreads the District Court's Order of February 4, 1991, and the RICO Case Statement.

wide movement of political and social protest. With the Founders, Respondents believe that "a function of free speech . . . is to invite dispute," that it "may indeed best serve its high purpose, when it induces a condition of unrest . . . or even stirs people to anger," (*Cox v. Louisiana*, 379 U.S. 536, 551-52 (1965)), and that, from the beginning, this nation has espoused a "profound national commitment . . . that debate on public issues should be uninhibited, robust and wide open" (*New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). Respondents' principles are rooted in the natural rights tradition of the Common Law: "Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb" (1 *Blackstone* 125). Respondents' principles also reflect the strategy of Dr. Martin Luther King, Jr.: "The purpose of direct action is to create such a crisis and foster such a tension that a community . . . is forced to confront the issue." (*Let the Trumpet Sound* 216).

This litigation has dragged on for seven years because Petitioners legally crafted an unparalleled theory of "extortion": all routine political or social protest that happens to be aimed at a business is "extortion" because it influences the operation of the business or the conduct of consumers. If businesses sell less, if consumers buy less, or if fewer employers are employed, that is "extortion" of each of them. The "extortionists" need not *obtain* anything, as in common law "extortion" – it is sufficient if the businesses, consumers, or employees "give up" something.

Not only do Petitioners seek to rewrite the jurisprudence of "extortion," they also seek to expand a federal statute – RICO – aimed at the commercial activity of organized crime and white-collar crime, and to use it as a hammer to suppress political and social protest. Ingeniously encompassing any activity that threatens to depreciate business, whether the activity is legal or illegal under any state or federal law, this unprecedented theory of RICO liability profoundly offends the values embodied in the First Amendment. Accordingly, this Court ought to reject it.

Beyond its broadly offensive character under the First Amendment, the background against which this appeal must be evaluated, this litigation suffers from four specific, legal defects, which justified its dismissal below and warrant affirmance now:

First, Petitioners complain of political and social protest; they do not allege the commercial dimension of Petitioners' conduct required by RICO under the *Ivic-Bagaric* rule. The requirement of a commercial dimension – personal gain to the offender rather than loss to the alleged victim – pervades RICO, its title, findings and purposes, definitions, prohibitions, criminal penalties, civil remedies, and liberal construction directive. The legislative history confirms the statute's plain language. In formulating RICO in the 1960's, the statute's sponsors consciously focused it on the commercial activity of organized crime and white-collar crime and specifically sought to exclude any First Amendment implications, including guilt by association and its application to political or social protest. In light of the ongoing anti-war protests, during the shepherding of RICO through Congress in 1969-1970, its sponsors took every opportunity to preclude its application to political or social protest. RICO, too, is *in pari materia* with the antitrust laws. Accordingly, the exclusion of political and social activity from the antitrust laws applies as well to RICO. Petitioners' theory of statutory interpretation, therefore, is like their theory of liability – unprecedented in this Court's jurisprudence. No text can or ought to be read divorced from its context. Statutory interpretation is "a holistic endeavor." *United States Nat'l Bank of Oregon v. Independent Insurance Agents of America*, 113 S.Ct. 2173, 2182 (1993) (quoting *United Saving Ass'n of Texas v. Timber of Inwood Forest Associates Ltd.*, 484 U.S. 365, 371 (1988)).

The commercial dimension requirement is settled law in two circuits and has been applied without difficulty for the past decade. Any reinterpretation now of RICO, adopted in 1970 when the text of legislation was routinely read in light of its legislative history, to eliminate the requirement of a commercial dimension would be tantamount to retroactive legislation.

The Department of Justice's participation in this appeal is difficult to square with its testimony before Congress in 1985, 1988 and 1989 that it had achieved unprecedented success with RICO against domestic terrorists and that it could not actively support legislation to eliminate the commercial gain requirement of *Ivic-Bagaric*. Likewise, in 1993, the Attorney General told Congress, while the Department was drafting its brief at the certiorari stage in this case, that *new* legislation was needed to stop clinic protests because Justice could not identify any other federal law that would be generally applicable and existing federal law is inadequate. In fact, during the past two decades, RICO (as well as many other federal laws) has been effectively used against domestic terrorism, notwithstanding the *Ivic-Bagaric* rule. Unable to cite one instance where any prosecution was thwarted because of it, the Government is reduced to offering little more than conclusory rhetoric.

Second, Petitioners allege one, and only one, RICO predicate act – Hobbs Act extortion. Yet, their rootless theory of "extortion" cannot be transplanted into the jurisprudence of extortion in the Hobbs Act, which incorporates basic common law concepts. Extortion, a larceny-type offense, requires "the obtaining of property from another. . . . " "Obtaining" does not mean "depriving." In fact, Petitioners never alleged that any Respondent obtained any property from any Petitioner. It is contradictory, in short, for Petitioners to allege both that Respondents *obtained* "property" – the right to do abortions, have abortions, or run an abortion clinic – and that Respondents' political and social objective was to *stop* such activities completely.

While Petitioners now insinuate "arson and bombing" in this Court, they never saw fit to allege them as predicate acts under RICO. Not a word of "arson" or "bombing" is found in the First, First Amended, or Second Amended Complaints. The RICO Case Statement, to be sure, refers, generically, to "bombing" and "arson," but it does not specify any state or federal statutory provision other than "extortion." "Bombing" and "arson" are merely referenced as "extortionate acts."

Third, because of the overriding First Amendment implications of the broad range of political activities chilled by

their open-ended claim, aggravated by their conclusory labeling of all pro-life protestors as "conspirators," Petitioners had a duty of heightened specificity in their pleading and in their assertions of fact in their RICO Case Statement. More decisively, the highest degree of specificity could not avoid the collision, as a matter of law, between the First Amendment and Petitioners' claim that depreciating an industry's business through conspiratorial protest activity constitutes "extortion."

Fourth, Petitioners lack standing to bring this case or pursue this appeal. DWHO and SWHO, the only two RICO plaintiffs, do not allege direct injury, cognizable under RICO, to themselves from Respondents' conduct, *i.e.*, an injury proximately caused by "racketeering activity" to their business or property. Instead, they allege that protests at *other* clinics in the nation caused them injury. Accordingly, they do not allege "extortion" under RICO by Respondents that proximately caused injury to their business or property.

Finally, none of these fatal defects can be rectified by Petitioners in this Court because the rules of civil procedure simply do not allow it. Petitioners filed their Second Amended Complaint after 35 months of litigation and discovery and their RICO Case Statement after 53 months. They spurned every opportunity to amend their Second Amended Complaint at all stages of this case or to seek additional discovery. The District Court's RICO Case Order, serving the function of a more particular statement under FRCP 12(e) and to control litigation under FRCP 16, put them on final notice that specification of their RICO claim was required. After the District Court dismissed the litigation in its entirety, Petitioners were required to seek to open the judgment under FRCP 59(e) or 60(b) and ask for leave under FRCP 15(a), if they wanted to amend for any purpose. They failed to do so. Instead, standing on their Complaint, they appealed. Moreover, when Petitioners submitted their RICO Case Statement that relied on deposition testimony and trial testimony as well as discovery documents, the District Court was entirely justified, in the alternative, in treating the motion as one for

summary judgment under FRCP 56 and dismissing the case with prejudice.

This litigation should come to an end.

ARGUMENT

I. THIS RICO ACTION WAS PROPERLY DISMISSED BECAUSE RESPONDENTS' CONDUCT WAS POLITICAL OR SOCIAL, NOT COMMERCIAL.

Petitioners failed to allege in their Complaint or their RICO Case Statement that Respondents' protests aimed at abortion clinics, had a commercial dimension – gain to Respondents, not loss to Petitioners – beyond its political or social dimensions. Accordingly, the District Court dismissed the Complaint, and the Court of Appeals affirmed. Because RICO requires an economic dimension to the enterprise or the racketeering activity, the judgment below must be affirmed.

A. The text of RICO requires a commercial dimension in the enterprise or the racketeering activity.

The interpretation of RICO must begin with "its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " *Reves v. Ernst & Young*, 113 S.Ct. 1163, 1169 (1993). A commercial dimension pervades the text of RICO – its title, its statement of findings and purpose, its definitions, its prohibitions, its criminal penalties, its civil remedies, and its Liberal Construction Clause.

1. Title

RICO's title, "Racketeer Influenced and Corrupt Organizations Act", suggests its commercial dimension.[7]

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[7] This Court looks to titles to determine the meaning of operative text. *See, e.g., United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1804)

"Racketeer" and "corrupt" must be read in their ordinary meaning.[8] XIII *Oxford English Dictionary* 80-81 (2nd ed. 1989) describes the usage of "racketeering" as "extorting money from business firms" or "engag[ing] in [a] fraudulent business."[9] "Corrupt" is described as "perverted from uprightness . . . in discharge of duty; influenced by bribery or the like; venal." *Id.* at 972. These words have meaning and limitations and neither is consonant with political or social protest.

2. Statement of Findings

After almost twenty years of investigations, Congress learned one unquestioned lesson about organized crime: it was about money and power, and any effort to curtail its activities in the market place had to strike at the flow of money into it. Four of RICO's five Statement of Findings, therefore, emphasize the commercial dimension of organized crime: "(1) . . . [It] annually drains billions of dollars from America's economy . . . (2) . . . derives a major portion of its power through money obtained from . . . illegal endeavors . . . (3) this money and power are increasingly used to infiltrate legitimate business . . . [and] (4) . . . [it] weaken[s] the stability of the Nation's economic system. . . . "[10] The fifth addresses defects

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(Marshall, C.J.); *United States Nat'l Bank of Oregon v. Independent Insurance Agents of America*, 113 S.Ct. 2173, 2183 (1993). *See generally*, Blakey and Gettings, *Racketeer Influenced and Corrupt Organization (RICO): Basic Concepts – Criminal and Civil Remedies*, 53 Temple L.Q. 1009, 1025 n.91 (1980) (tracing evolution of RICO's title to reflect the distinction between legitimate and illegitimate organizations) ("Basic Concepts").

[8] *Smith v. United States*, 113 S.Ct. 2050, 2054 (1993); *Russello*, 464 U.S. 16, 21 (1983).

[9] *See also* Blakey, "*The RICO Civil Fraud Action in Context*," 58 Notre Dame L. Rev. 237, 250 n.41 (1982) (tracing history of "racket") ("Civil Action").

[10] 84 Stat. 922-23 (1970). While the Statement of Findings and Purpose prefaces the Organized Crime Control Act, using it to interpret

in the law. 84 Stat. 923 (1970). These findings, in short, have no relevance to political or social protests.

3. Definitions

The operative definitions under RICO set out in 18 U.S.C. §1961 focus on "persons," "enterprises," and "activities" having a commercial or gain dimension. Under RICO, "person" defines who may violate the statute and who may sue under its civil provisions.[11] "Person" in 18 U.S.C. §1961(3) focuses on individuals and entities "capable of holding a legal or beneficial interest in property." A "person" who cannot gain property or a beneficial interest in it is not a "person" within RICO. Under RICO, "enterprise" defines the entities by, through, or against which a "pattern of racketeering activity" may be engaged in.[12] The notion of gain pervades the category. "Enterprise" "may be divided into four broad categories: (1) commercial entities (*e.g.*, corporations, partnerships, sole proprietorships); (2) benevolent organizations (*e.g.*, unions, benefit funds, schools); (3) governmental units (*e.g.*, the office of a governor, a state legislator, a court, a prosecutor's office, a police or sheriff department, or an executive department or agency); or (4) associations in fact (licit or illicit)."[13] Typically, each enterprise will have a commercial dimension, that is, it engages in commercial

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RICO is appropriate, since a comparable Statement of Findings and Purpose prefaced S. 1861, RICO's predecessor. 115 Cong. Rec. 9568 (1969).

[11] 18 U.S.C. §§ 1962, 1964. *See Civil Action* at 290 n.151.

[12] 18 U.S.C. §1961(4). *See generally* Note, *Functions of the RICO Enterprise Concept*, 64 Notre Dame L. Rev. 646 (1989) ("Functions").

Petitioners (Pet. Br. 26-29) and the Government (Gov. Br. 11-15) make much of Judge Friendly's analysis of "enterprise" in subsections (a), (b), and (c), *United States v. Ivic*, 700 F.2d 51, 60-61 (2d Cir. 1983), but they ignore the fact that his analysis was reinterpreted by Judge Kaufman in *United States v. Bagaric*, 706 F.2d 42, 56-57 (2d Cir. 1983), *cert. denied*, 464 U.S. 840 (1983). The rule is not the *Ivic* rule, but the *Ivic-Bagaric* rule. *See* text *infra* at n.25.

[13] *Civil Action* at 290-99 (footnotes omitted).

transactions aimed at direct or indirect gain that could constitute "racketeering activity" under 18 U.S.C. §1961(1), even if the enterprise's purpose may not be commercial or particular conduct associated with it may not be commercial in a particular instance.

Under RICO, the predicate offenses are "racketeering activity." 18 U.S.C. §1961(1). They "may also be grouped into four broad, but not mutually exclusive categories: (1) violence; (2) provision of illegal goods and services; (3) corruption in the labor movement or among public officials; and (4) commercial and other forms of fraud."[14] The thrust of these offenses, too, is commercial.

The inclusion of violence or corruption offenses that are not commercial, that is, directly aimed at gain, reflects Congress' recognition of the *instrumental* role these offenses play in the commercial activity of enterprises in the marketplace that are aimed at gain,[15] a point that is underscored by the scope of RICO civil remedies.[16]

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[14] *Civil Action* at 300-306 (footnotes omitted).

[15] For the development of this idea, *see* President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime* 8 (1967) ("Task Force Report") ("There are at least two aspects of organized crime that characterize it as a unique form of criminal activity . . . corruption [and] enforcement. . . . "); National Commission on Reform of Federal Criminal Laws: *Study Draft of A New Federal Criminal Code* §1005, 68-69 (1970) ("enforcer" and "corrupted public servants"); 115 Cong. Rec. 5873 (1969) (statement of Sen. McClellan) ("Two positions in the organized crime group make it substantially different from other criminal operations: the enforcer and the corruptor."); S. Rep. No. 617, 91st Cong., 1st Sess. 41 (1969) ("the enforcer and the corruptor") ("Senate Report"). Enterprises may play several, but not mutually exclusive, roles in RICO violations: "prize," "instrument," "victim" or "perpetrator." *Civil Action* at 307. A commercial dimension – in the enterprise or the racketeering – must be present no matter what role the enterprise plays.

[16] *See infra* n.17.

4. Prohibitions

Under RICO, the prohibitions of 18 U.S.C. §1962 also reflect its commercial dimension. Section 1962(a) strikes at the use or investment of "*income* derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt" in an "enterprise" that "affect[s] commerce." Section 1962(b) strikes at the acquisition or maintenance "through a pattern of racketeering activity, or through collection of an unlawful debt of an *interest*" in an "enterprise" that "affect[s] commerce." Section 1962(c) strikes at "persons" "employed by or associated with" an "enterprise" that "affect[s] commerce" from conducting its "*affairs*" through a "pattern of racketeering *activity*" or "the collection of unlawful debt." "Income" and "interest", of course, reflect "gain". Two similar words are crucial in the interpretation of Section 1962(c), the provision at issue in this appeal: "activity" and "affairs." I *Oxford English Dictionary* 130 (2nd ed. 1989) describes "activity" as "action." Similarly, "affairs" is generally described as "what has to be done," but its more particular meaning is "commercial or professional business." *Id.* at 209-10. Reading "activity" and "affairs" to mean "act" or "do" makes no sense. If similar words have a similar meaning, different words have a different meaning. *See Reves*, 113 S.Ct. at 1169. When the two words are combined, therefore, they indicate that Section 1962(c) applies to commercial or professional action, not action generally. Section 1962(d) strikes at conspiracy to violate . . . subsections (a), (b), or (c). . . . " Accordingly, Section 1962 reflects "gain" in each of its subsections: Section 1962(a) – the investment or use of "gain" in an enterprise; Section 1962(b) – the acquisition or maintaining of "gain" in an enterprise; Section 1962(c) – conducting the "commercial activity" of an enterprise; and Section 1962(d) – conspiracy to do so.

5. Penalties

RICO's criminal penalties are set out in 18 U.S.C. §1963. While they include traditional penalties, RICO's most

distinctive criminal penalty is its forfeiture of interests acquired or maintained in enterprises operated or conducted in violation of the statute. Thus, RICO's commercial dimension is sharply cast into relief.

6. Remedies

RICO civil remedies are set out in 18 U.S.C. §1964. While they include injunctions, RICO's most distinctive civil remedy is its authorization of treble damages to persons "injured" in their "business or property" by reason of "a violation of section 1962." The instrumental character of the inclusion of violence and corruption in the predicate offenses is, therefore, sharply brought out by the failure of Section 1964 to authorize recovery of damages for personal injury.[17]

7. Liberal Construction Clause

RICO's Liberal Construction Clause is consistent with this analysis. It mandates liberal construction to "effectuate . . . [RICO's] remedial purposes." 84 Stat. 947 (1970). Those purposes must first be determined before its text may be liberally construed. *Reves*, 113 S.Ct. at 1172 (clause is "not an invitation to apply RICO to new purposes that Congress never intended"). RICO's purpose is protecting the integrity of commercial transactions.[18] Directing RICO away from that dimension, and toward political or social activity, would be inconsistent with its purpose. The Liberal Construction Clause ought not be used to undermine RICO itself.[19]

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[17] *See, e.g., Grogan v. Platt*, 835 F.2d 844, 845-48 (11th Cir.) ("property" does not include economic aspects of murder), *cert. denied*, 488 U.S. 981 (1988).

[18] *See infra* n.116.

[19] *Perrine v. Chesapeake & Delaware Canal Co.*, 50 U.S. (9 How.) 172, 187 (1850) (Taney, C.J.) ("an interpretation of [a] statute which . . . would render different sections inconsistent with each other cannot be the true one"). *Holmes v. Securities Investor Protection Corporation*, 112 S.Ct. 1311, 1321 (1992); (allowing such suits "would open the door to

8. Decisions of Courts of Appeals

The decisions of the Courts of Appeals, with one exception, reflect this analysis. RICO's commercial dimension was first explicitly recognized in a judicial decision in *United States v. Ivic*,[20] and clarified by *United States v. Bagaric*.[21] The *Ivic-Bagaric* rule is followed by other Circuit Courts of Appeals.[22] The exception is the Third Circuit in *Northeast Women's Center Inc. v. McMonagle*.[23]

In *Ivic*, a prosecution of Croatian nationalists for a conspiracy to kill a Croatian journalist, the Second Circuit dismissed a RICO Section 1962(d) count because the enterprise "was neither claimed nor shown to have any mercenary motive." The goal, political in character, was to advance

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'massive and complex damages litigation [, which would] not only burde[n] the courts, but also undermin[e] the effectiveness of treble-damages suits.' ") (quoting *Associated General Contractors of Cal. Inc. v. Carpenters*, 459 U.S. 519, 545 (1983)).

[20] 700 F.2d 51 (2d Cir. 1983).

[21] 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983).

[22] The Eighth Circuit's seminal RICO prosecution, which involved bribery of judges, was *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). The *Anderson* court observed that "enterprise" includes "only an association having an . . . *economic* goal . . . . " *Id.* at 1372 (emphasis supplied). *Anderson*'s dictum became a holding in *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir.) (control of labor unions), *cert. denied*, 488 U.S. 974 (1988). Subsequently, the Eighth Circuit heard *United States v. Ellison*, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986), which involved the prosecution of a leader of a paramilitary, white supremacist organization (CSA) under RICO for arsons, one of which was an arson fraud. Ellison contended that the Government failed to prove "any connection between one of the two arsons . . . and any interest of CSA as an enterprise." 793 F.2d at 949. The Eighth Circuit held that it was not necessary to prove that the racketeering activity realized gain or "benefitted the enterprise," only that it "*affected* the enterprise." *Id.* at 950 (emphasis in original).

[23] 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989).

Croatian independence.[24] Judge Friendly's opinion for the Second Circuit carefully analyzed RICO's language, structure, title, findings, origins, and Liberal Construction Clause. In *Bagaric*, Judge Kaufman, writing for a successor panel, held that *Ivic* did not exculpate another group of Croatian nationalists, when their enterprise "perpetrated an . . . extortion scheme . . . . " 706 F.2d at 46, 49. When the *Bagaric* defendants sought to read *Ivic* to require that the "financial motive" be "ultimate and overriding" and "must surmount all others," the *Bagaric* court rejected that construction, properly noting that *Ivic* did not require that "economic *gain* must be the sole motive of every RICO enterprise."[25] *Bagaric* also properly held that the commercial or gain dimension requirement is an "objective characterization" of the enterprise or predicate acts, not a question of proof of state of mind. *Ivic* had referred to "motivated activity," "motive," "motivation," or "purpose." 700 F.2d at 59 n.5, 59, 63, 65. *Bagaric*, however, clarified this "imprecise" use of "motive;" it did not refer to "mens rea," but to an "objective assessment" of "economic dimension." 706 F.2d at 53 n.11. Respondents adopt "dimension" for precision; they also refer to the requirement as the *Ivic-Bagaric* rule. Petitioners' concern ("litigation nightmare" Pet. Br. 38) is obviated by adopting the *Ivic-Bagaric* rule, not their suggested "subjective and

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[24] 700 F.2d at 59. The *Ivic* opinion used "economic," "mercenary," "financial," and "commercial" interchangeably. *Id.* at 59, 59 n.5, 63 and 65. Respondents adopt "commercial," since it was used by RICO's principal sponsor in the Senate. 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan).

[25] *Id.* at 53, 55 (emphasis supplied). Contrary to Petitioners' understanding (Pet. Br. 36), the *Bagaric* court did not conclude that the enterprise before it lacked an "economically-motivated" enterprise. The Court held that the prosecution may show that commercial dimension "through either the enterprise or the predicate acts of racketeering"; it also held that the "core of the enterprise was the commission of more than fifty acts of the classic economic crime of extortion . . . . " *Id.* at 57-58.

dangerous inquiry" into "the ultimate or overriding subjective motivation." (Pet. Br. 38, 41-42). The Government's concerns (Gov. Br. 19-21) are similarly allayed.[26]

The exception to the *Ivic-Bagaric* rule is the Third Circuit in *Northeast Women's Center, Inc. v. McMonagle*,[27] in

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[26] Subsequently, in *United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985), which involved armed robberies and murders by the Black Liberation Army, the Second Circuit, following *Ivic* and *Bagaric*, held that all that is necessary is " '*some* financial purpose' . . . *either* to the criminal enterprise or the acts of racketeering," 758 F.2d at 853 (citation omitted; emphasis in original), which was proven by the "economic crime" of robbery. *Id.* at 833.

The Second Circuit's decade-long application of the *Ivic-Bagaric* rule has not prevented the Government from effectively prosecuting terrorism under RICO or other federal statutes. In *Ivic*, the defendants were convicted under other federal statutes. 700 F.2d at 56. The *Bagaric* defendants were convicted under RICO. Most recently, the suspects in the World Trade Center bombing were indicted under 13 other federal statutes. *United States v. Rahman*, S3 93 Cr. 181 (MBM) (S.D. N.Y. 1993).

The advocacy of the Department's lawyers in this appeal (Gov. Br. 2) ("impair . . . ability to prosecute acts of terrorism") cannot be squared with their testimony before Congress. In 1985, the Department of Justice told Congress that RICO is "an effective tool against domestic terrorism . . . ." *Oversight on Civil RICO Suits*, Hearings before the Senate Judiciary Comm., 99th Cong., 1st Sess. 96 (1985) (statement of Ass. Att'y Gen. Stephen Trott) ("Oversight: 1985") *See also Racketeer Influenced and Corrupt Organization Reform Act*, Hearings before the Senate Comm. on the Judiciary, 101st Cong., 1st Sess. 37-42 (1989) (statement of Dep. Ass. Att'y Gen. John C. Keeney) ("achieved unprecedented success against organized crime . . . and [other] serious criminal activity [including] . . . neo-Nazi terrorists.") ("Reform Act 1989"). Indeed, when legislation was proposed to change the *Ivic-Bargaric* rule, the Department thought it was hardly necessary. *RICO Reform*, Hearings before the House Subcomm. on Crim. Justice, 100th Cong., 1st and 2nd Sess. 630 (1988) ("not actively support" change) (statement of Dep. Ass. Att'y Gen. John C. Keeney) ("RICO Reform 1988").

[27] 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989).

which it held that "economic motivation" was not required.[28] Its abbreviated holding, unaccompanied by analysis, is, for that reason alone, unpersuasive.[29]

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[28] *Id.* at 1349 n.7. The Third Circuit also held that "extortion" under 18 U.S.C. §1951 did not require the "obtaining of property." *Id.* at 1349-50.

[29] Petitioners wrongly contend that "most of the circuit courts of appeals have held defendants liable under RICO despite the absence of economically-motivated enterprises or acts." Pet. Br. 36-37. In seven of the nine cases cited, the commercial dimension issue was not addressed by the courts, since it was obviously present. The enterprise in *United States v. Yarbrough*, 852 F.2d 1522 (9th Cir. 1988), *cert. denied*, 488 U.S. 866 (1988), engaged in financially motivated predicate acts – armed robbery, counterfeiting, bank robbery, armored car robbery – and proceeds went to participants in the enterprise or to the enterprise. *Id.* at 1527, 1544. In *United States v. Ellison*, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986), the Eighth Circuit observed: "The arson of Ellison's sister's house enabled her, a former member, to *gain* financially . . . . " 793 F.2d at 950 (emphasis supplied). The CSA also engaged in thefts "intended to produce operating funds." *Id.* at 945, 950. *United States v. Qaoud*, 777 F.2d 1105 (6th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986), involved bribery, mail fraud, and "kickback schemes in exchange for judicial favors." 777 F.2d at 1107. *United States v. Dickens*, 695 F.2d 765 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983), involved "17 robberies committed . . . to finance the purposes and aims of the 'New World' . . . . " 695 F.2d at 769, 771. *United States v. Altomare*, 625 F.2d 5 (4th Cir. 1980), involved bribery and obstruction of law enforcement "with the intent to facilitate an illegal gambling business" under 18 U.S.C. §1511. *Id.* at 6 n.1, 7 & n.4. *United States v. Grzywacz*, 603 F.2d 682 (7th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980), involved bribes from businesses. *Id.* at 684. Finally, Petitioners cite *Bagaric* itself, which explicitly addressed and reaffirmed the economic dimension or gain requirement as an element of RICO. *Id.* at 57 & n.13, 58.

That leaves two cases relied on by Petitioners – *McMonagle* and *Feminist Women's Health Center v. Roberts*, No. C86-161, 1989 WL 56017. *Roberts*, a District Court decision, relied on *McMonagle*. In any case, *Roberts* is on appeal in the Ninth Circuit, which withdrew its submission pending this Court's decision. *Feminist Women's Health Center v. Codispoti*, No. 90-3526 (July 27, 1993). *See also United States v. Freeman*, Nos. 92-10094, 92-10102 (9th Cir. Sept. 22, 1993) (adopting *Ivic*, holding "that the economic motive of the predicate acts [bribery] is sufficient to uphold a RICO conviction").

B. RICO's legislative history confirms RICO's exclusively commercial dimension.

When statutory language, syntax, or context – internal or external – is ambiguous,[30] resort to legislative history is proper.[31] Ultimately, however, the interpretation of a statute is "a holistic endeavor."[32]

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[30] The Government's suggestion that "there can be no claim that . . . [RICO] is ambiguous" (Gov. Br. 18) is bad semantics and bad law. Ambiguity is of three types: semantic, syntactical, and contextual. R. Dickerson, *The Fundamentals of Legal Drafting* 25-27, 32 (1965) ("[T]he most troublesome [ambiguity is] contextual ambiguity [either internal or external, that is,] the uncertainty of whether a particular implication arises. * * * [I]t is sometimes said that a draftsman should leave nothing to implication. This is nonsense. No communication can operate without leaving part of the total communication to implication. Implication is merely the meaning that context adds to express (dictionary) meaning.") *See United States v. Monia*, 317 U.S. 424, 432 (1943) ("A statute . . . cannot be severed [from its context] without being mutilated. * * * The meaning of a statute cannot be gained by confining inquiry within its four corners.") (Frankfurter, J. in dissent); *Duparquet Huot & Moncuse Co. v. Evans*, 297 U.S. 216, 220-21 (1936) ("[H]istory is a teacher that is not to be ignored.") (Cardozo, J.).

[31] This Court routinely looks to the legislative history of RICO in interpreting the statute. *United States v. Turkette* 452 U.S. 576, 586, 589 (1981); *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 486, 489 (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 238-41 (1987); *Agency Holding Corp. v. Malley-Duff & Associates Inc.*, 483 U.S. 143, 151 (1987); *United States v. Monsanto*, 491 U.S. 600, 613 (1989); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 236-39 (1989); *Tafflin v. Levitt*, 493 U.S. 455, 461 (1990); *Holmes v. Securities Investor Protection Corporation*, 112 S.Ct. 1311, 1317 (1992); *Reves v. Ernst & Young*, 113 S.Ct. 1163, 1170-72 (1993).

[32] *United States Nat'l Bank of Oregon v. Independent Insurance Agents of America*, 113 S.Ct. 2173, 2182 (1993) (quoting *United Saving Ass'n of Texas v. Timber of Inwood Forest Associates Ltd.*, 484 U.S. 365, 371 (1988)).

It is argued that legislation should be principally read with reference to its operative text. As a rule of statutory construction to be applied to legislation enacted by Congress *after* a certain date, this position would

The key to understanding RICO's legislative history lies in the evolution of "enterprise criminality," which, in turn, evolved against the backdrop of the Communist Party membership prosecutions in the 1950's and the Vietnam anti-war protests prosecutions in 1969-70. Nevertheless, RICO's commercial dimension may be best understood by examining the principle of selection by which RICO's sponsors *included* and *excluded* the federal and state predicate offenses in RICO.[33] This history demonstrates that RICO's sponsors consciously focused RICO on the commercial activity – the acquisition of gain, not the infliction of loss – of organized crime as well as

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have much to recommend it, but as a rule of statutory construction to be applied to statutes enacted by the Congress *before* that date and *under a contrary rule of statutory construction*, this position is open to the strictures that are leveled against retroactive legislation. *See, e.g., Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855-56 (1990) (Scalia, J., concurring).

"Congress legislates with knowledge of . . . basic rules of statutory construction." *Rowland v. California Men's Colony*, 113 S.Ct. 716, 720 (1993). If those rules envision an examination of legislative history – and such an examination dictates exculpation, but not making such an examination dictates inculpation – changing the rules of statutory interpretation would enlarge the scope of inculpation, contrary to the principle of legality. J. Hall, *General Principles of Criminal Law* 58-64 (2d ed. 1960). As such, statutes ought to be construed in light of the rules of statutory interpretation followed when they were drafted. *Daily Income Fund Inc. v. Fox*, 464 U.S. 523, 536 (1984). In 1970, when RICO was enacted, the practice of this Court was routinely to examine the legislative history of a statute. *See, e.g., Nelson v. George*, 399 U.S. 224, 228 (1970). Indeed, a "Westlaw" search for "legislative history" in the decade before the enactment of the 1970 Act turned up 334 decisions of this Court. Resort to legislative history was routine.

[33] *See generally, Civil Action* at 249-80 (1982); Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 Col. L. Rev. 774, 776-86 (1988) ("Goldsmith"); *Functions* at 647-54. For a statement of the rationale of the Organized Crime Act itself, *see* McClellan, *The Organized Crime Control Act (S.30) or Its critics: Which Threatens Civil Liberties?* 46 Notre Dame L. Rev. 57 (1970) ("McClellan") (with G. Robert Blakey and Russell Coombs).

white-collar crime and that they took every opportunity to preclude its application to political or social protest.

1. Congress focused on organized crime in the market place.

Following the Attorney General's 1950 Conference on Organized Crime, the Kefauver Committee investigated organized crime and noted its infiltration into legitimate business.[34] Following the Kefauver Committee's work, Senator John L. McClellan, the chairman of a number of key committees and subcommittees and subsequently one of the principal sponsors of RICO, chaired three investigations into the illegal activities of organized crime, focusing on labor racketeering, gambling, and narcotics.[35] These investigations examined illicit enterprises and the infiltration of organized crime into businesses as well as unions. Following these investigations, the President's Commission on Law Enforcement and Administration of Justice undertook an examination of organized crime; it focused on "enterprise criminality."[36] RICO's two track – criminal and civil – approach to "enterprise criminality" in the marketplace grew out of the Commission's findings and recommendations.

From 1967 to 1969, Senator McClellan and Senator Roman L. Hruska, another key Senate sponsor of RICO, also served on the National Commission on Reform of the Federal Criminal Laws. It, too, examined federal criminal law and the

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[34] *See Basic Concepts* at 1014 n.21 (reports cited).

[35] *See Id.* at 1015 nn. 22, 23 (reports cited).

[36] President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 187-210 (1967) ("Challenge"). "Enterprise criminality" consists of "organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors." *United States v. Cauble*, 706 F. 2d 1322, 1330 (5th Cir. 1983) (quoting *Basic Concepts* at 1013-14), *cert. denied*, 465 U.S. 1005 (1984)).

challenge of organized crime.[37] While the Commission considered a proposal on "organized crime leadership," it did not carry it forward in its final report. Nevertheless, the proposal, a predecessor of RICO, is enlightening, since it focused on organized crime, not white-collar crime or political or social protest.[38]

2. S. 2187, the 1965 legislation, was targeted at illicit enterprises.

On the basis of his hearings on organized crime, Senator McClellan introduced his syndicate bill, S. 2187, on June 24, 1965.[39] The bill was targeted at illicit enterprises; it was one of RICO's key precursors. S. 2187 would have outlawed knowingly "becom[ing] a member of (1) the Mafia or (2) any other organization having . . . [as] its purposes" engaging in certain designated offenses. *Id.* at §2(a). S. 2187 was Senator McClellan's first legislative effort to curtail enterprise criminality in the underworld. S. 2187 included among its designated offenses "acts . . . in violation of the criminal laws of the United States or any State, relating to gambling, extortion, blackmail, narcotics, prostitution, and labor racketeering." *Id.*

Testifying before Senator McClellan's Committee, Attorney General Nicholas deB. Katzenbach raised constitutional

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[37] The Commission was created by Act of Nov. 9, 1966, Pub. L. No. 89-801, 80 Stat. 1516 (1966). *See Civil Action* at 47.

[38] National Commission on Reform of Federal Criminal Laws: *Study Draft of a New Federal Criminal Code* §1005 (1970) (defining "criminal syndicate" as "an association of ten or more persons for engaging on a continuing basis in [certain predicate crimes]"). The predicate crimes were those "which experience has shown to be the specialties of the criminal syndicates." *Consultant's Report on Conspiracy and Organized Crime*, I Working Papers: National Commission on Reform of Federal Criminal Laws 381, 383-84 (1970) (Professor G. Robert Blakey).

[39] S. 2187, 89th Cong., 1st Sess. (1965), 111 Cong. Rec. 14680 (1965).

objections to the membership focus of S. 2187.[40] McClellan acknowledged the force of Katzenbach's testimony.[41] Senator McClellan, therefore, abandoned his membership approach in S. 2187 and adopted the "conduct" approach of RICO. As Professor Michael Goldsmith observed, "[B]y focusing more on conduct, [Senator McClellan in] RICO sought to rectify the constitutional problems raised by S. 2187."[42]

3. S. 2048, S. 2049, S. 1623, the 1967 and 1969 legislation, were targeted at licit enterprises.

While Senator McClellan's legislative efforts focused on enterprise criminality in the underworld, Senator Hruska introduced legislation focused on a separate, but related problem: the infiltration of legitimate business in the upperworld by organized crime. In 1967, Senator Hruska introduced S. 2048 and S. 2049.[43] These two bills were RICO's other key precursors. S. 2048 proposed amendments to the Sherman Act that would have outlawed the investing of unreported income "in any *business* enterprise" and using the "income to establish or operate . . . such . . . *business* enterprise." (emphasis supplied). "Business" was not a word of limitation in Senator McClellan's earlier syndicate bill; it would be dropped later

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[40] *Criminal Law and Procedures*, Hearings on S. 2187 *et al.* before the Subcomm. on Crim. Laws and Proc. of the Sen. Comm. on the Judiciary, 89th Cong., 2d Sess. 31-32 (1966). The Committee on Federal Legislation of the Association of the Bar of the City of New York raised similar objections. *Id.* at 306-07 (citing the Smith Act (18 U.S.C. §2385) prosecutions in *Scales v. United States*, 367 U.S. 203 (1961), and *Yates v. United States*, 354 U.S. 298 (1957)).

[41] *Id.* at 37. During the House debate, Congressman Richard Poff, a key House sponsor, expressly recognized the First Amendment issues raised by criminalizing Mafia "membership," specifically citing Katzenbach's testimony on S. 2187. 116 Cong. Rec. 35344 (1970).

[42] *Goldsmith* at 783 & nn.70-72.

[43] S. 2048, 90th Cong., 1st Sess. (1967); 113 Cong. Rec. 18007 (1967); S. 2049, 90th Cong., 1st Sess. (1967); 113 Cong. Rec. 18007 (1967); 113 Cong. Rec. 17997-18002 (1967).

when the bills were integrated. Drafted to supplement S. 2048, S. 2049 would have made it illegal for principals in certain specified crimes to invest income from those crimes in "any business enterprise." The predicate offenses were characteristic of organized crime, not white-collar crime, much less political or social protest.[44] Congressman Richard Poff introduced companion bills to S. 2048 and S. 2049 in the House.[45] No action was taken on these bills, but they were studied by the American Bar Association.[46]

In the 91st Congress, Senator Hruska introduced a new bill, S. 1623, "The Criminal Activity Profits Act", that reflected elements from S. 2048 and S. 2049.[47] Once again, Senator Hruska explained that the focus of his bill was on offenses characteristic of organized crime, not white-collar crime or political or social protest.[48] S. 1623 included in its

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[44] In introducing S. 2048 and S. 2049, Senator Hruska stated:

> The second bill, S. 2049, would prohibit the investment in legitimate business enterprises of income derived from specified criminal activity – *especially those criminal activities engaged in by members of organized crime families* such as gambling, bribery, narcotics, extortion and the like.

113 Cong. Rec. 17999 (1967) (emphasis supplied).

[45] H.R. 11266 and H.R. 11268, 90th Cong., 1st Sess (1967); 113 Cong. Rec. 17946, 17976 (1967). In introducing his bills, Congressman Poff stated:

> [t]he first bill would outlaw the investment of income derived from specified criminal activities in legitimate business. The activities specified are those *typical of syndicate conduct*. They include gambling, bribery, extortion, counterfeiting, narcotics traffic, and white slavery.

113 Cong. Rec. 17947 (1967) (emphasis supplied).

[46] *See Basic Concepts* 1016-17 (analysis of Bar Association recommendations).

[47] S. 1623, 91st Cong., 1st Sess. (1969); 115 Cong. Rec. 6992-96 (1969).

[48] In introducing S. 1623, Senator Hruska stated:

> In the 90th Congress I sponsored two bills, S. 2048 and S. 2049 which were essentially similar to the bill I introduce

definition of "criminal activity" many, but not all of the offenses that would be later incorporated in RICO.[49]

4. S. 30, The Organized Crime Control Act, was a comprehensive approach to enterprise criminality.

On January 15, 1969, Senators McClellan and Hruska introduced S. 30, "The Organized Crime Control Act."[50] As introduced, S. 30 did not include RICO-type provisions. RICO was later incorporated into S. 30 as Title IX.

5. S. 1861, the 1969 legislation, was targeted at licit and illicit enterprises.

Senators McClellan and Hruska merged their two independent, but complementary approaches to "enterprise criminality" – in the underworld and in the upperworld – when they

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> today. * * * The bill is a synthesis of both of those bills, incorporating all of their features into a unified whole. It attacks the economic power of *organized crime* and its exercise of unfair competition with honest businessmen on two fronts – criminal and civil . . . .
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> Last year, . . . the American Bar Association examined the two earlier bills, S. 2048 and S. 2049, and endorsed the principles and objectives of both. * * * As a result of the ABA recommendation [to enact the bills outside of the antitrust statutes], the single new bill has been drafted as an amendment to title 18 of the United States Code with self-contained enforcement and discovery procedures.
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> 115 Cong. Rec. 6993 (1969) (emphasis supplied).

[49] *See* S. 1623, 91st Cong., 1st Sess. §2(1) (1969); 115 Cong. Rec. 6995 (1969).

[50] S. 30, 91st Cong., 1st Sess. (1969); 115 Cong. Rec. 769 (1969). *See generally Measures Relating to Organized Crime*: Hearings on S. 30, S. 994, Before the Subcomm. on Crim. Laws and Proc. of the Sen. Comm. on the Judiciary, 91st Cong., 1st Sess. 4-29 (1969) ("Senate Hearings"); *Organized Crime Control*, Hearings on S. 30 and Related Proposals before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. (1970) ("House Hearings").

cosponsored S. 1861, "The Corrupt Organizations Act," which was introduced on April 18, 1969.[51] S. 1861 combined McClellan's concern with underworld organizations with Hruska's concern with infiltration of legitimate business. Senator McClellan explained that the focus of the legislation was on the various methods of "organized crime."[52] S. 1861 also dropped the word "business" from the phrase "business enterprise" in S. 1623, RICO's predecessor legislation, not to *eliminate* its commercial dimension, but to *expand* its scope beyond *legitimate* businesses to *illegitimate* enterprises.[53]

The introductory language of S. 1861 was similar to the introductory language of S. 30, which, in turn, was derived from Senator McClellan's 1965 legislation, S. 2187.[54] S. 1861 was incorporated into S. 30 as Title IX (RICO).[55] When S. 1861 was incorporated into S. 30, and reported out of the Judiciary Committee, the "predicate crimes associated with white-collar activity were [also] added to the text."[56] Accordingly, the scope of RICO as applying to white-collar crime as well as organized crime was perfected.

The scope of the remedial features of RICO was shaped in the House. S. 1623, as introduced, contained not only criminal penalties but also private antitrust-type civil

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[51] S. 1861, 91st Cong., 1st Sess. (1969); 115 Cong. Rec. 9566 (1969).

[52] 115 Cong. Rec. 9567 (1969).

[53] *Goldsmith* at 780. This change is confirmed by the Senate Report, which states that §1961 "defines 'enterprise' to include associations in fact, as well as legally recognized associative entities." *S. Rep.* 617 at 158. Petitioners simply misread this change. (Pet. Br. 22, 29, and 34-35) The Government misses the point because it begins its legislative history after the relevant developments had occurred. (Gov. Br. 16-17).

[54] 115 Cong. Rec. 9568 (1969).

[55] *Senate Report* at 83. The incorporation of S. 1861 into S. 30 was anticipated by Senator McClellan when he introduced the bill: "Its provisions might well be incorporated by way of amendment into S. 30 itself." 115 Cong. Rec. 9567 (1969).

[56] *Goldsmith* at 787; 264 n.78; 268-79.

remedies.[57] Nevertheless, S. 1861, as introduced and as incorporated into S. 30, was silent on a private claim for relief.[58] While S. 30 was pending in the House, the American Bar Association endorsed it, making suggestions, including a private treble damage claim for relief "based upon the concept of Section 4 of the Clayton Act."[59] Senator McClellan termed the suggestion "constructive,"[60] and it was incorporated into the bill as it was passed by the House,[61] was accepted by the Senate,[62] and was signed by the President.[63]

Nothing in these legislative developments reflects an intent on the part of RICO's sponsors, in the Senate or House, to permit the statute to be applicable, beyond its antitrust counterparts, to political or social protest. The final text of RICO joined themes of combatting organized crime and other syndicated activity as well as the infiltration of legitimate entities by criminal groups. Investment, takeover, and operation were prohibited; the objective was a marketplace, not only free, but characterized by integrity. To circumvent the membership problem, RICO focused, not on joining a group, but on participating in its affairs through a pattern of criminal conduct. The criminal activities included in the statute were characteristic of organized and white-collar crime, not political or social protest. The remedies, too, were principally

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[57] S. 1623, 91st Cong., 1st Sess. §§ 3, 4 (1969). The American Bar Association endorsed the private enforcement mechanism of RICO in the *Senate Hearing* at 558.

[58] *See Civil Action* at 262 n.71.

[59] *House Hearings* at 534-44 (statement of Edward L. Wright, President of the American Bar Association).

[60] 116 Cong. Rec. 25190 (1970). Other Senators also endorsed the private enforcement mechanism. 116 Cong. Rec. 36296 (1970) (statement of Sen. Dole).

[61] *Id.* at 35363.

[62] *Id.* at 36296-64.

[63] *Id.* at 37264. The President called for civil remedies, including the treble damage provisions, when he endorsed S. 30 in his Message on Organized Crime, *reprinted in, Senate Hearings* at 449.

economic (forfeiture, treble damages for injury to business or property, etc.). Accordingly, it would be beyond congressional authorization if RICO were now applied to curtail political or social protest.

6. The scope of "racketeering activity" included white-collar crime but excluded political or social protest.

The principal of selection used to include the predicate offenses in RICO provides further confirmation of the statute's commercial or "gain" dimension. When a subset is selected from a set, much can be learned about the character of the subset by examining the set itself. So, too, with RICO. Its legislative history demonstrates two movements. One direction narrowed the predicate offenses to *exclude* political or social demonstrations; the other enlarged the predicate offenses to *include* white-collar crime.[64] *See Russello*, 464 U.S. at 23.

The predicate offenses included in Title IX were narrowed from earlier bills. As originally introduced, S. 1861 defined "racketeering activity" to include "any act involving the danger of violence to life, limb, or property, indictable under State or Federal law and punishable by imprisonment for more than one year . . . . "[65] Two objections were raised to this definition. The Department of Justice opposed it because of its indeterminate breadth and on the grounds of federalism.[66] The Department suggested an amendment to narrow the definition to specified offenses "customarily invoked against organized crime." *Id.* at 122. This suggestion was adopted by RICO's sponsors.

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[64] *See Senate Report* at 83 ("Clarifying, limiting, and expanding amendments have been made . . . . ").

[65] S. 1861, 91st Cong., 1st Sess. §2(a) (1969); 115 Cong. Rec. 9569 (1969).

[66] Letter from Richard G. Kleindienst, Deputy Attorney General of August 11, 1969, *reprinted in*, *Senate Report* at 121-26.

On the other hand, the American Civil Liberties Union ("ACLU") opposed the breadth of S. 30 because of a perceived threat to political or social demonstrations. It testified against the sentencing provisions of S. 30 in the Senate hearings.[67] The ACLU also testified against the breadth of the original definition of "racketeering activity," which it found "particularly troublesome."[68] The ACLU cited the potential impact of S. 1861 on "the campus disorders which racked Columbia University a year ago April."[69]

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[67] The ACLU testified:

> While it is required that conduct constituting more than one crime as part of a continuing course of activity to be engaged in or caused by one or more of the conspirators to effect the objective of the conspiratorial relationship, it is not clear, in addition to the other ambiguities encompassed in that provision, whether a conviction must have been obtained for the one or more crimes. The language is so broad that it could be regarded as including, in addition to the Mafia or other narcotics or gambling syndicates, a labor strike, a civil rights demonstration or Klan march, an anti-war or pro-war demonstration, or a campus demonstration or counter-demonstration which was expected and planned to result in some sense in a series of crimes (e.g., mass trespass or violation of a parade ordinance) even though the statute or regulation that was the basis of the "crime" is invalid either on its face or as applied.

Senate Hearings at 472 (statement of Lawrence Speiser).

[68] The ACLU testified:

> Last year's massive anti-war demonstration at the Pentagon resulted in a number of arrests for acts involving the danger of violence to life, limb or property indictable under state or federal law and punishable by imprisonment for more than one year . . . offenses of the kind which resulted from the demonstrations in connection with the anti-war protest movement could fall within the definition of pattern of racketeering activity of the bill . . . .

Id. at 475-76 (statement of Lawrence Speiser).

[69] The ACLU testified:

> This was a group activity which resulted in arrests, involved the danger of violence to property, and involved offenses for

In response, the Senate Judiciary Committee, adopted two amendments to RICO. First, when the Committee incorporated S. 1861 into S. 30 as Title IX, it eliminated one aspect of the broad definition of "racketeering activity" ("danger of violence to life, limb or property") and replaced it, as the Department of Justice suggested, with specifically designated state offenses. Significantly, when the Senate debated the 1970 Act, the ACLU continued to oppose Title X (sentencing), but it favorably noted the responsive changes in Title IX (RICO).[70]

Second, the Senate Judiciary Committee, expanded the specific federal offenses to include offenses characteristic of white-collar crime, an amendment suggested by the Securities and Exchange Commission.[71] Accordingly, between the introduction of S. 1861, its incorporation into Title IX, and the reporting of the combined bills to the Senate,[72] the Judiciary

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> which imprisonment for more than a year was possible. Under S. 1861, Mr. [James Simon] Kunen [author of "Strawberry Statement," describing his participation in the campus disorders] could not lawfully invest any of the proceeds from his book. Whatever one may think of the offenses or the offenders in these hypotheticals, and questions of whether or not their activity is in any way protected by constitutional guarantees aside, it is clear that this proposed legislation is in no way intended to subject them to the penalties described. Nevertheless, there is absolutely nothing in the bill to prevent them from being so used.

Id. at 476.

[70] "The substantive provisions of Title IX have been substantially revised so as to eliminate most of the previously objectionable features." 116 Cong. Rec. 854 (1970) (ACLU statement put into the record by Sen. Young).

[71] *Report of the Ad Hoc Civil RICO Task Force*; A.B.A. Sec. Corp. Banking & Bus. L. at 99-100 n.130 (1985).

[72] *Senate Report* at 21-22. As amended by the Committee, the Statement of Finding and Purpose expressly mentions "fraud," and "racketeering activity" includes mail fraud, wire fraud, transportation fraud, bankruptcy fraud, and securities fraud. *See Civil Action* at 268.

Committee *expanded* "racketeering activity" beyond the subset of offenses included in the Penal Reform Commission proposal to include white-collar offenses,[73] and, in response to the concern of the ACLU, *narrowed* the subset of offenses to preclude its application to political or social protest. As reported, RICO was an attack on the commercial activities of organized crime and white-collar crime but not political or social protest.

Senator McClellan commented on the predicate offenses at a later point. Significantly, he explained the rationale of RICO, indicating that the principle of selection for the predicate offenses was "commercial exploitation."[74] In particular, the Bar Association of the City of New York had attacked RICO, then Title IX, objecting to the Senate Report that said the predicate offenses were offenses "characteristically violated by members of organized crime."[75] The Bar Committee complained that the subset was too inclusive, because it included offenses that were committed by persons not engaged in organized crime. Senator McClellan responded to the Bar Committee, and to other objections of the ACLU, in an address after passage in the Senate but while RICO was pending in the House:[76]

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[73] *See supra* n.47.

[74] 116 Cong. Rec. 18940 (1970).

[75] The *Senate Report* described "racketeering activity" as "includ[ing] crimes most often associated with organized crime, especially those associated with the infiltration of legitimate organizations." *Senate Report* at 158.

[76] 116 Cong. Rec. 18940 (1970) (emphasis supplied). *See also McClellan* at 142-43. This same characterization of the predicate offenses is repeatedly made by RICO's sponsors. " 'Racketeering activity' is defined in terms of specific State and Federal criminal statutes now characteristically violated by participants in organized crime." *House Hearings* at 85 (memorandum of Sen. McClellan of May 20, 1970); " 'Racketeering activity' is defined to include a wide variety of crimes, both State and Federal, that are generally associated with organized crime." 116 Cong. Rec. 35295 (statement of Cong. Poff). Sponsors comments are entitled to "weight." *Lewis v. United States*, 445 U.S. 55, 63 (1980). When a sponsor inserts a memorandum in the legislative history, it becomes a "weighty gloss" on the statute. *Galvan v. Press*, 347 U.S. 522, 527 (1954).

> The Senate report does not claim . . . . that the listed offenses are committed primarily by members of organized crime, only that those offenses are characteristic of organized crime. The listed offenses lend themselves to *organized commercial exploitation*, unlike some other offenses such as rape, and experience has shown they commonly are committed by participants in organized crime.
>
> * * *
>
> It is impossible to draw an effective statute which reaches most of the *commercial* activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well . . . .
>
> It is self-defeating to attempt to exclude from any list of offenses such as that found in title IX all offenses which commonly are committed by persons not involved in organized crime. Title IX's list does all that can be expected, . . . it lists offenses committed by organized crime with substantial frequency, as part of its *commercial* operations (emphasis supplied).

Senator McClellan's point was repeated in a law review article, which was published during the consideration of the bill by the House:

> Since the purpose of Title IX is *economic*, it would be pointless surplusage for it to cover crimes which are not adapted to *commercial exploitation*.

McClellan at 161-62 (emphasis supplied).[77] Thus, McClellan explained the criterion by which the predicate acts were selected for inclusion in RICO: they were those that lent themselves to commercial exploitation.[78]

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[77] Significantly, Senator McClellan's article was cited as an authoritative interpretation of RICO by Congressman Poff, during the House debate. 116 Cong. Rec. 35298 (1970).

[78] The commercial character of RICO is confirmed by the Senate Report:

> Title IX thus brings to bear on the infiltration of organized crime into legitimate business or other organizations the full panoply of

Congress's understanding that political and social protest was excluded from RICO may also be seen by comparing the scope of Title IX (RICO) with Title X (Dangerous Special Offender Sentencing). Title IX's application is limited by a specific list of designated crimes. Title X, however, was made applicable to all "felonies".[79]

During Senate debate, Senator Edward Kennedy objected to Title X, expressing concern that anti-war protestors, such as "Dr. [Benjamin] Spock," might be "subjected to special sentencing."[80] He proposed to amend Title X to make its application limited "to those convicted of the crimes" designated in Title IX of RICO.[81] Kennedy argued that Title X's scope ("any felony") would extend it to anti-war protesters, such as Dr. Spock or to policemen who violate civil rights.[82] To exclude such individuals from Title X, Senator Kennedy proposed an amendment to limit Title X to the specified offenses in Title IX, by substituting for "any felony" in Title

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> civil remedies . . . . * * * Nevertheless, it must be emphasized that these remedies are not exclusive, and that *title IX seeks essentially an economic, not a punitive goal.* However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities . . . .

Senate Report at 81 (emphasis supplied).

[79] Title X was codified at 18 U.S.C. §3575. It was repealed by Pub. L. 98-473, Title II, chapter II, §212(a)(2) (1984), 98 Stat. 1987 (1984).

[80] 116 Cong. Rec. 845 (1970). Dr. Benjamin Spock was convicted of conspiring to violate the Selective Service Act by staging sit-ins at armed services recruitment centers, draft card burnings, and demonstrations, but his conviction was reversed on appeal and remanded for a new trial. *United States v. Spock*, 416 F.2d 165, 168 & n.2 (1st Cir. 1969). Dr. Spock's anti-war conduct closely parallels the allegations against Respondents: sit-ins, demonstrations, and press conferences, mass surrenders of draft cards, and card burnings.

[81] 116 Cong. Rec. 845 (1970).

[82] The ACLU expressed the same concern about Title X:

> In addition to organized crime cases, this provision might be read as applying to civil rights activists or political demonstrators (where a pattern of "criminal" conduct might be a series of technical trespasses). The Dr. Spock case and the pending case of the Chicago 7 come to mind.

116 Cong. Rec. 855 (1970) (ACLU statement introduced by Senator Young).

X the list of offenses in Title IX. *Id.* at 845-46. In response, Senator McClellan argued for making Title X applicable to "any felony," and he objected to limiting Title X to offenses specified in Title IX. *Id.* at 846. "It seems to me," Senator McClellan argued, "that it would be a grave mistake to restrict dangerous offender sentencing to any list of specified offenses supposedly typical of organized crime." *Id.* at 845. Senator Kennedy's amendment failed to pass. *Id.* at 849.

Obviously, this exchange demonstrates an informed judgment of Senators McClellan and Kennedy that Title IX would not include Dr. Spock, that is, Title IX did not apply to political or social protest. Senators Kennedy and McClellan thought that if Title X were limited to the specific list of offenses in Title IX, Dr. Spock would be excluded from Title X. Accordingly, the intent of the key sponsor of RICO, Senator McClellan, not to have it applicable to political or social protest was made clear.[83]

7. Coercion under state law and riot under 18 U.S.C. §2101 were omitted.

The principle of selection used to *exclude* certain offenses from RICO provides further confirmation of the statutes commercial dimension. Had Senators McClellan or Hruska wanted to make RICO applicable to political or social protests, they had only to add "coercion" to the list of state offenses or 18 U.S.C. §2101 (riot) to the list of federal offenses. *See Turkette*, 452 U.S. at 581. Since neither is in the predicate offenses, neither ought now to be added by interpretation. *See Tafflin*, 493 U.S. at 462.

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[83] The isolated comment in the House debates that RICO might apply to some undefined "counter-revolutionary activity" is entitled to little weight. 116 Cong. Rec. 35326 (1970) (stat. of Cong. Rarich) It is not the informed commentary of a sponsor. *S & E Contractors v. United States*, 406 U.S. 1, 13 n.9 (1972).

a. Coercion.

"Coercion" was unknown to the common law.[84] Since the Model Penal Code of 1962, however, the distinction between "extortion," a common law offense, and "coercion," a statutory innovation, is increasingly reflected in state law.[85]

Extortion, not coercion, was incorporated into the state offenses under RICO.[86] Had Congress wanted to reach

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[84] *See, e.g., State v. Ullman*, 5 Minn. 1, 2 (1861).

[85] *See* Model Penal Code §212.5 "Criminal Coercion" (Official Draft 1962) ("to restrict another's freedom of action . . . he threatens . . .); *id.* §223.4 "Theft by Extortion" ("obtains property by another by threatening . . .) *See generally*, Kadish, *The Model Penal Code's Historical Antecedents*, 19 Rutgers L.J. 521, 538 (1988):

> The Model Penal Code has become . . . the principal text in criminal law teaching, the point of departure for criminal law scholarship, and the greatest single influence on the many new state codes . . . . * * * The success of the Model Penal Code has been stunning. Largely under its influence, well over half the states have adopted revised penal codes . . . .

The *Model Penal Code and Commentaries* §223.4 at 203 (1980) observes:

> [B]ehavior prohibited by this section [theft by extortion] is closely analogous to that proscribed as criminal coercion under Section 212.5. * * * The major difference lies in the purpose and effect of the coercive and extortionate threats. Criminal coercion punishes threats made 'with purpose unlawfully to restrict another's freedom of action to his detriment.' while extortion is included within the consolidated offense of theft because it is restricted to one who 'obtains property of another by' threats.

Commentaries, id. at §212.5 at 266, explains:

> It is arguable that these categories of threat [theft by extortion] should be included in the offense of criminal coercion. . . . The judgment underlying the Model Code, however, is that the underlying wrong in extortion – obtaining property to which the actor knows he is not entitled – provides a more reliable basis for punishment than does the Section 212.5 requirement of a 'purpose unlawfully to restrict another's freedom of action to his detriment.'

[86] *United States v. Private Sanitation Industry Ass'n*, 793 F. Supp. 1114, 1129-39 (E.D.N.Y. 1992) (Glasser, J.) (coercion not within RICO) ("the distinction is not trivial . . . . [I]t is of the essence of extortion – not only in New York law but more importantly, in the law generally – that one compel another

political and social protest, it had only to add "coercion."[87]

b. 18 U.S.C. §2101 (riot).

18 U.S.C. §2101 is conspicuous by its absence from the list of predicate federal offenses.[88] The omission of the anti-riot provisions of Section 2101 in RICO is crucial in light of the roles played in the enactment of Section 2101 by Senators McClellan and Hruska, the two principal sponsors of RICO in the Senate. Both were aware of the statute. Had either wanted RICO to cover illegal demonstrations, it would have taken little effort to add Section 2101 to the list of predicate federal offenses.

Between November 1967 and August 1969, Senator McClellan, as chairman of the Senate Permanent Subcommittee on Investigation, held 71 days of hearings on riots and

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to surrender property."); *Center Cadillac v. Bank Leumi Trust Co.*, 808 F. Supp. 213, 231-33 (S.D.N.Y. 1992) (Motley, J.) ("coercion . . . not among . . . laws . . . providing a basis for RICO liability"); *cf. United States v. Nardello*, 393 U.S. 286, 296 (1969) ("a type of activity generally known as extortionate since money was to be obtained from the victim by virtue of fear"); *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973) ("conventional definition of extortion . . . obtaining of property from another- . . . by . . . fear").

[87] Respondents adopt the argument of Respondent Terry *et al.* that "extortion" under the Hobbs Act (18 U.S.C. §1951) was not pled and inculpating facts were not set out in the RICO Case Statement by Petitioners. Respondents did not "obtain the property" of Petitioners. See text *supra* at 6.

[88] 18 U.S.C. §2101(a)(1), in pertinent part, provides:

> Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce . . . . with intent –
> (A) to incite a riot . . .
> Shall be fined not more than $10,000 . . . .

18 U.S.C. §2102(a), in pertinent part, provides:

> As used in this chapter, the term "riot" means a public disturbance involving . . . an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual . . . .

other civil disorders.[89] After H.R. 421 passed the House, the Senate Judiciary Committee held 13 days of hearings on it. H.R. 421 was the legislation that first proposed adding Section 2101 to Title 18.[90] Senators McClellan and Hruska each chaired a day of those hearings.[91] Senator Hruska spoke on the floor[92] in favor of the amendment to the Civil Right Act of 1968[93] that added Section 2101 to Title 18.[94] Senators McClellan and Hruska also voted for the amendment.[95] Accordingly, Senators McClellan and Hruska were aware of the issue (civil disturbances) and the law (18 U.S.C. §2101) when RICO was drafted and enacted. Repeatedly, Senator McClellan referred to his own investigations into organized crime, labor racketeering, narcotics, and gambling, when he reported S. 30 to the Senate[96] and spoke in favor of the bill on the Senate floor.[97] McClellan and Hruska, however, do not mention civil disturbances in speaking in favor of S. 30 or Title IX. McClellan does not refer to his work in investigating civil disturbances, and neither McClellan nor Hruska refers to his efforts in processing 18 U.S.C. §2101. Had either wanted to include political or social protest, rather than to exclude it, there is no doubt that they knew how to speak their minds. *See Sedima*, 473 U.S. at 489.[98] Twisting RICO to make it

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[89] *Riots, Civil and Criminal Disorder*; Hearings before the Sen. Permanent Subcomm. on Investigations of the Comm. on Government Operations, 90th and 91st Cong., 1st and 2nd Sess., Parts 1-23 (1967-1969).

[90] H.R. 421, 90th Cong., 1st Sess. (1967); *Anti-Riot Bill 1967*: Hearings before the Comm. on the Jud., 90th Cong., 1st Sess. Parts 1 & 2 (1967).

[91] *Id.* Part 1 at 353 (August 7, 1967) (McClellan); *id.* Part 2 at 753 (August 28, 1967) (Hruska).

[92] 114 Cong. Rec. 5211 (1968) (statement of Sen. Hruska)

[93] Pub. L. 90-284, 82 Stat. 73 (1968).

[94] 114 Cong. Rec. 5033 (1968).

[95] *Id.* at 5214 (1968) (the amendment passed 82 to 13).

[96] *Senate Report* at 76-78.

[97] 116 Cong. Rec. 585 (1970).

[98] *See also* Title XI of S. 30, 84 Stat. 952-60 (1970), which enacted Chapter 40, Importation Manufacture, Distribution and Storage of Explosive Materials (18 U.S.C. §841 *et seq.*). The crimes enacted in Title XI were not

applicable to political and social protests beyond the intent of its principal sponsors is rewriting, not interpreting RICO, "a job for Congress . . . not this court." *H.J. Inc.*, 492 U.S. at 249 (quoting *Sedima*, 473 U.S. at 495).

C. RICO must be read *in pari materia* with the antitrust statutes to exclude political and social protest.

Congress does not draft criminal legislation on a clean slate. It crafts it against a history – continuous, uniform, and intact – of a well-settled presupposition that established legal defenses or exclusions will be read into such legislation in the absence of a contrary, clear statement.[99] Those defenses or exclusions are principally, but not exclusively, defenses or exclusions stemming from our nation's common law background.[100]

Federal criminal legislation is often silent, for example, on the crucial defense of lack of state of mind, yet a state of mind defense is implied in federal criminal legislation under a fairly complex, but well-established body of jurisprudence.[101]

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included in the list in Title IX (RICO). Title XI was "prompted" for inclusion in the legislation "by the national emergency of criminal bombings brought into dramatic focus by the recent tragedy at the University of Wisconsin" 116 Cong. Rec. 35201 (1970) (statement of Cong. Poff). Not including the new offenses in Title IX was consistent with the desire not to have RICO applicable to political or social protest. *Russello*, 464 U.S. at 23.

[99] *See, e.g., Eastern Railroad Pres. Conference v. Noerr Motor Frgt., Inc.*, 365 U.S. 127, 138 (1961) (exclusion) ("not lightly impute to Congress intent to invade [constitutional] freedoms"); *Parker v. Brown*, 317 U.S. 341, 351 (1943) (exclusion) (intent to have Sherman Act applicable to state action not lightly attributable to Congress).

[100] *See, e.g., United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980) (defense of duress or necessity) ("legislates against a background of Anglo-Saxon common law"); *Morissette v. United States*, 342 U.S. 246, 263 (1952) (defense of lack of state of mind) ("Congress . . . presumably knows and adopts the cluster of ideas . . . attached to each borrowed word").

[101] *United States v. Balint*, 258 U.S. 250, 251-52 (1922) (if regulatory and silent, strict); *Morissette v. United States*, 342 U.S. 246, 251 (1952) (if

Typically, too, other defenses or exclusions are implied in federal criminal legislation: insanity,[102] intoxication,[103] exercise of public authority,[104] and protection of persons[105] – all to the text of murder statutes[106] – as well as duress,[107] protection of property,[108] entrapment,[109] and official misstatement of law[110] into other statutes. The practice of implying such defenses or exclusions into federal criminal legislation

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common law and silent, state of mind implied); *United States v. Feola*, 420 U.S. 671, 676 n.9 (1975) (elements of jurisdictional significance only, strict); *United States v. Bailey*, 444 U.S. 394, 415 (1980) (implication of state of mind for each element of offense must be considered separately).

Petitioners concede (Pet. Br. 43) that state of mind is "inherent" in RICO, that is, not expressed on the face of its operative text, but an element of the statute. They provide, however, no principled rationale for recognizing an implied state of mind, while disregarding any other well-established defense or exclusion.

[102] *Compare Davis v. United States*, 165 U.S. 373, 378 (1897) (insanity defense recognized to murder prosecution) *with* 18 U.S.C. §17 (codification of insanity defense following assassination attempt of President).

[103] *Tucker v. United States*, 151 U.S. 164, 170 (1894) (intoxication defense recognized in murder prosecution).

[104] *United States v. Clark*, 31 F. 710 (C.C. S.D. Mich 1887) (officer may take life of prisoner to prevent escape).

[105] *Beard v. United States*, 158 U.S. 550, 563-64 (1895) (retreat outside of dwelling house not required to protect self against great bodily harm).

[106] *See* 18 U.S.C. §1111(A) for the current version of the general federal murder statute, whose text contains no express defenses.

[107] *Iva Ikuko Toguri D'Aguino v. United States*, 192 F.2d 338, 358 (9th Cir. 1951) ("Tokyo Rose" prosecution) (duress recognized as defense to treason), *cert. denied*, 343 U.S. 935 (1952). *See also United States v. Bailey*, 444 U.S. 394, 415 (1980) (duress and necessity recognized for escape prosecution).

[108] *McNabb v. United States*, 123 F.2d 848, 854 (6th Cir. 1941) (person may defend property short of taking life), *rev'd on other grounds*, 318 U.S. 332 (1943).

[109] *Sorrells v. United States*, 287 U.S. 435, 443 (1932) (implied exclusion to federal statutes).

[110] *See United States v. Laub*, 385 U.S. 475, 487 (1967) ("may not be punished for action undertaken in good faith reliance upon authoritative assurance that punishment will not attach").

began during the earliest period of our nation's history.[111] Should that practice be abandoned today, it would work a revolution in federal criminal jurisprudence of unparalleled scope.[112]

RICO was enacted against the background of settled antitrust jurisprudence, as this Court has repeatedly noted. *Holmes*, 112 S.Ct. at 1317. An examination of such statutes *in pari materia* is a "long standing practice."[113] The basic principle of statutory construction under the antitrust statutes is that an intent to exclude areas is to be determined, not solely "from the literal meaning of the words" of the statutes, but from "the purpose, the subject matter, the context and the legislative history of the" acts. *Parker*, 317 U.S. at 351. The

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[111] *See, e.g., The William Gray*, 29 F. Cas. 1300, 1302 (No. 17,694) (C.C. N.Y. 1810) (necessity, that is, storm, defense to violation of port embargo); *United States v. Ashton*, 24 F. Cas. 873, 874 (No. 14,470) (C.C. Mass. 1834) (Story, J.) (necessity, that is, unseaworthy vessel returned for repairs, defense to mutiny).

[112] Petitioners suggest that "racketeering activity" contains no ambiguity and leaves open no possibility that additional limitations may apply. (Pet. Br. 24) The provisions of 18 U.S.C. §§ 2251-52 (sexual exploitation of children) are "racketeering activity." 18 U.S.C. §1961(1)(B). Should this Court recognize a defense of entrapment to a RICO charge predicated on their violation? *See Jacobson v. United States*, 112 S.Ct. 1535, 1540-43 (1992) (entrapment defense applicable to unadorned text of 18 U.S.C. §2252 (a)(2)(A)).

[113] *Crawford Fitting Co. v. J.T. Gibbons Inc.*, 482 U.S. 437, 445 (1987). The principal statutes *in pari materia* with RICO are the antitrust statutes. *Holmes*, 112 S.Ct. at 1317 (citing *Agency* 483 U.S. at 150-51; *Shearson*, 482 U.S. at 241; and *Sedima*, 473 U.S. at 489); S. Rep. No. 617, 91st Cong., 1st Sess. 81 (1969); H.R. Rep. No. 1549, 91st Cong., 2nd Sess. 56-60 (1970). In fact, RICO and the antitrust statutes are well-integrated; they reflect related policies, which aid in construing them. *Turkette*, 452 U.S. at 590; *Russello*, 464 U.S. at 24; *Sedima* 473 U.S. at 493; *Tafflin*, 493 U.S. at 466; *Holmes*, 112 S.Ct. at 1321. The nation's commercial marketplaces must not only be free, but characterized by integrity. "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." C. Kaysen & D. Turner, *Antitrust Policy* 17 (1959); *American C & L Co. v. United States*, 257 U.S. 377, 414 (1921) (Brandeis, J. dissenting) ("Restraint may be exerted through force or fraud or agreement.") RICO focuses on the first two; the antitrust statutes focus on the third.

antitrust statutes were "aimed primarily at combinations having *commercial* objectives," and they may be applied beyond such combinations "only to a very limited extent."[114] In particular, the antitrust statutes evince "a purpose to regulate . . . business activity . . . [,not] political activity, a purpose which would have no basis whatever in the legislative histor[ies]" of the statutes. *Noerr*, 365 U.S. at 137. Any other construction of the statutes would "raise important constitutional questions," *id.* at 138, an intent not "lightly imputed to Congress." *Id.* "The proscriptions of the . . . [statutes], tailored as they are for the *business* world, are not at all appropriate for application in the *political* arena."[115]

When Senator McClellan introduced one of RICO's key precursors, S. 1861, he stated:

> The bill draws heavily upon the remedies developed in the field of antitrust . . . There is, however, no intention here of importing the great complexity of antitrust law enforcement into this field. *Nor is*

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[114] *Klor's Inc. v. Broadway-Hale Store, Inc.*, 359 U.S. 207, 213 n.7 (1959) (emphasis supplied).

[115] *Id.* at 141 (emphasis supplied). *Noerr* also held that the antitrust statutes do not reach activities that are political "simply because those activities have a commercial impact . . . . " *Id.* This aspect of *Noerr* disposes of one aspect (gain, not loss) of Petitioners' argument that RICO's "economic dimension" may be met by a showing of impact to Petitioners (loss) rather than benefit to Respondents (gain) or other benefit to Respondents not proximately related to "racketeering activity." (Pet. Br. 11, 29-32, 45-48). The other aspect (benefit not derived from Petitioners) ought also to be moot, since Petitioners have abandoned their §1962(a) claim (*id.* at 4 n.1), and rightly so, in light of *Hemmings v. Barian*, 822 F.2d 688, 692 (7th Cir. 1987) and *Holmes*, 112 S.Ct. at 1318. *See* 968 F.2d at 623-25.

The *Noerr* exclusion is statutory in character. 365 U.S. at 145 ("Act was not violated . . . . ") Accordingly, the conduct need not be protected by the First Amendment to come within the exclusion. Indeed, if it did, the exclusion itself would be unnecessary, for no statute may prohibit conduct constitutionally protected. *See also United Mine Workers v. Pennington*, 381 U.S. 657, 669-72 (1965); *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301, 1317-18 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1980) (*Noerr-Pennington* Doctrine not modified or limited by subsequent cases; boycott excluded from statute, even though it had the commercial effect of a trade restraint.).

there any intention of using the antitrust laws for a purpose beyond the legislative intent at the time of their passage.[116]

As it is "always appropriate to assume that our elected representatives . . . know the law,"[117] the applicability to RICO – and to the conduct of Respondents – of the *Noerr-Pennington* Doctrine, which was settled antitrust jurisprudence in 1970, ought to be beyond serious argument. RICO, like the antitrust statutes, was consciously structured to apply to the marketplace – underworld or upperworld – of commercial activity, not to the arena of political or social protest. Accordingly, political or social protest is excluded from RICO.

D. Congressional action confirms that RICO has an exclusively commercial dimension.

The "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[118] Nevertheless, subsequent legislative developments, when they "confirm"[119] a construction of the statute are entitled to "significant weight."[120]

Efforts to "reform" RICO after this Court's decision in *Sedima* sought to curtail commercial abuse.[121] Nevertheless, other themes emerged. In 1987, Senator Howard Metzenbaum introduced legislation in the Senate[122] to circumscribe RICO's use in business litigation. In testimony on Senator Metzenbaum's legislation, the National Association of Attorneys

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[116] 115 Cong. Rec. 9567 (1969) (emphasis supplied).

[117] *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979).

[118] *Russello*, 464 U.S. at 26 (quoting *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 165 n.27 (1983)).

[119] *See Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980).

[120] *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980).

[121] *See, e.g., Oversight 1985* 243 (accounting profession), 629 (securities industry).

[122] S. 1523, 100th Cong., 1st Sess. (1987).

General, however, called for the elimination of the *Ivic-Bagaric* rule "to preserve RICO's effectiveness . . . against terrorism or other violence-prone groups."[123] In contrast, the American Civil Liberties Union expressed its concern that RICO was being used "for chilling First Amendment Rights."[124] In 1987, Congressmen John Conyers introduced legislation in the House to overturn the *Ivic-Bagaric* rule.[125] The Attorney General of Arizona supported the Conyer's bill.[126] No action was taken on either bill.

In 1989, Congressman Rick Boucher also introduced legislation to circumscribe RICO's use in routine business litigation.[127] This time the ACLU testified that the legislation was a "good beginning," but, for "more complete protection," it called for the codification of the *Ivic-Bagaric* rule "to except all politically motivated activity from RICO."[128] Senator Dennis DeConcini introduced companion legislation in the Senate.[129] Professor G. Robert Blakey supported RICO reform to curtail the abuse of RICO in the commercial fraud area, but he also called for the elimination of the *Ivic-Bagaric* rule as well as the adoption of amendments that would curtail

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[123] *Proposed RICO Reform Legislation*: Hearing before Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 89, 119 (1987).

[124] *Id.* at 316-17 ("most notable manifestation . . . has been in the abortion clinic context. • • • Unfortunately, it is not necessary for plaintiffs . . . to prevail . . . before severe damage is inflicted on the defendants. • • • In fact, the mere threat of a RICO claim . . . may be enough to preempt an organization from activities normally thought to be covered by the First Amendment . . . . ").

[125] H.R. 3240, 100th Cong., 2nd Sess. §9 (1987); 133 Cong. Rec. 3351 (1987) (statement of Rep. Conyers) (H.R. 3240 intended to "set aside" *United States v. Ivic*, 700 F.2d 51, 59-65, (2d Cir. 1983), to make possible RICO's application to "violence based conspiracies, including international terrorists organizations and domestic anti-Semitic or white hate groups.")

[126] *Id.* at 825-26.

[127] H.R. 1046, 101st Cong., 1st Sess. (1989).

[128] *Reform Act 1989* at 351.

[129] S. 438, 101st Cong., 1st Sess (1989).

demonstration related litigation abuse.[130] The DeConcini legislation was reported out of committee, but not acted on by the Senate.[131]

In 1991, Congressman William J. Hughes introduced legislation in the House that would have circumscribed RICO's use in business litigation.[132] It included language drafted to curtail RICO's use in the context of a "demonstration, assembly, protest, rally, or similar form of public

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[130] *Reform Act 1989* at 571, 576-78. Professor Blakey observed:

> The potential for litigation abuse, the impact of which may well be to chill pro-abortion or anti-abortion demonstrations, in this area is manifest. In fact, up to 30,000 individuals have been arrested throughout the nation in approximately 380 protests over the past year in connection with such demonstrations. . . . If all of those individuals became embroiled in RICO litigation in the Federal courts (30 to a suit), it would increase the number of RICO cases by a factor of three; the suits, too, would be complex conspiracy litigation. Such suits are being filed. The danger of a chill on First Amendment rights and of litigation abuse in the administration of justice in the Federal courts is not, however, RICO-specific. * * * It is not even abortion-specific. Similar demonstrations take place, for example, in peace rallies, at nuclear facilities, and at research hospitals that use animals. The Supreme Court guidelines for civil litigation in the area of free speech are, of course, fairly specific . . . . The need is, therefore, for discovery and evidence limitations and provisions that make possible early vindication of litigant and lower court abuse in First Amendment litigation. RICO reform legislation provides an appropriate vehicle for making those general changes (citations omitted).

[131] S. Rep. No. 101-269, 101st Cong., 2nd Sess. (1990). As reported, S. 438 would have amended 18 U.S.C. §1962 by adding a new subsection (e):

> (e) For purposes of this chapter, the term "racketeering activity" shall not include participation in, or the organization or support of, any non-violent demonstration, assembly, protest, rally or similar form of public speech undertaken for reasons other than economic or commercial gain or advantage, and no action may be maintained under this chapter based on such activities.

Id. at 34.

[132] H.R. 1717, 102nd Cong., 1st Sess. (1991).

speech." *Id.* §8. The legislation was supported by testimony[133] by the ACLU.[134]

When Attorney General Janet Reno took office, she directed the Civil Rights and Criminal Divisions to examine federal law to determine its applicability to access to abortion clinics.[135] The judgment of these seasoned attorneys: existing federal law was inadequate. She called for new legislation.[136]

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[133] *RICO Act Amendments Act of 1991:* Hearing before the Subcomm. of Intellectual Property and Judicial Administration of the House Comm. on the Judiciary, 102nd Cong., 1st Sess. 114-16 (1991).

[134] The ACLU testified:

> Not only abortion clinic protestors are at risk. RICO applies to anti-nuclear protestors, anti-apartheid protestors, animal rights protestors, and others who occasionally have trespassed and damaged property or who publish newsletters. Historically, many anti-Vietnam war protests . . . and civil rights protestors could [have been] . . . sued under RICO . . . .

Id. at 118-19. The ACLU outlined for the Committee the adverse impact of RICO litigation on protestors. *Id.* (*Northwest Womens Center v. McMonagle*: 42 anti-abortion protestors named, none dismissed under Rule 12(b)(6), but 6 dismissed subsequently, including 1 by judgment not withstanding the verdict; $887 in actual damages, but $65,000 attorney's fees awarded; *Feminist Women's Health Center v. Roberts*: 3 accused of Civil RICO; 1 admitted bombing; 2 found not responsible for substantive violation, but responsible for conspiracy, even though association with bomber limited to lawful activity).

[135] Testimony of Attorney General Janet Reno Before The Senate Labor Committee (May 12, 1993).

[136] The Attorney General told the Committee:

> [W]e . . . [have not] been able to identify *any other federal law* that would be generally applicable to private interference with a woman's right to choose. We therefore have concluded that existing federal law is inadequate and new federal authority [is needed].

Id. at 7 (emphasis supplied).

The Attorney General's study led to the introduction of legislation in the Senate[137] and House.[138] In reliance on the Attorney General's testimony, the Senate Committee on Labor and Human Resource reported the Senate bill on July 29, 1993.[139]

"[W]isdom or unwisdom . . . is to be put aside in the process of interpreting a statute."[140] "Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress."[141] Manifestly, Congress knew in 1970 what it was doing, when it modeled RICO on the antitrust statutes, and focused RICO on business activity designed to produce gain, not inflict loss. It also knew what it was doing, when it narrowed drafts of RICO, when their possible application to demonstrators was criticized on First Amendment grounds. Since 1970, Congress has had ample opportunity to alter its 1970 decision, as it has considered the *Ivic-Bagaric* rule in hearings year after year. Accordingly, Petitioners seek in a judicial forum a change that they have been unable to obtain in a legislative forum. "[R]e-writing [RICO] is a job for Congress, if it is so inclined, and not for this court."[142]

E. Conclusion

Petitioners filed two complaints and two amended complaints. They conducted years of discovery. They filed a case statement. But no count of any complaint or paragraph of the case statement pled or asserted facts that met RICO's commercial dimension – gain to Respondents, not loss to Petitioners. To be sure, Petitioners did allege conspiracy – at least in conclusory fashion – and "extortion" – even though, it was their rootless version of it – against Respondents in Respondents' efforts to drive abortion clinics out of business. But

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[137] S. 636, 103rd Cong., 1st Sess. (1993).

[138] H.R. 796, 103rd Cong., 1st Sess (1993).

[139] S. Rep. No. 103-117, 103rd Cong., 1st Sess. 15 (1993).

[140] *Rubin v. United States*, 449 U.S. 424, 431 n.8 (1981) (quoting *TVA v. Hill*, 437 U.S. 151, 194 (1978)).

[141] *United States v. Rodgers*, 469 U.S. 475, 484 (1984).

[142] *H.J. Inc.*, 492 U.S. at 249 (quoting *Sedima*, 473 U.S. at 495, 498).

never did Petitioners contend that Respondents sought personal, economic gain from their actions. As a result, the District Court properly dismissed the Complaint with prejudice. So, too, the Court of Appeal affirmed. This Court should do no less.[143]

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

THOMAS BREJCHA*
ABRAMSON & FOX
One East Wacker Drive
Suite 3800
Chicago, Illinois 60601
(312) 644-8500

ROBERT S. HARLIB
105 W. Madison St.
Suite 300
Chicago, Illinois 60602
(312) 236-6605

CLARKE D. FORSYTHE
Americans United for Life
343 S. Dearborn St. #1804
Chicago, Illinois 60604
(312) 786-9494

*Counsel for Respondents***

*Counsel of Record

September 29, 1993

** The able assistance of Marc Haefner (J.D. expected, Notre Dame '94), James Scott (J.D. expected, Notre Dame '95) and Robert McBride (J.D. expected, Notre Dame '95) is hereby acknowledged.

[143] Respondents adopt Respondent Timothy Murphy's argument that Petitioners failed to plead their Complaint with the specificity required by the First Amendment where a conspiracy is alleged that touches political or social activities. As such, Petitioners' claim for relief was properly dismissed with prejudice. Similarly, Respondents adopt the able arguments of Respondents Terry *et al.* on the issues of Article III and RICO standing and of Respondent Migliorino on the First Amendment.

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No. 92-780

IN THE

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October Term, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

v.

JOSEPH M. SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE ACTION LEAGUE, INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE, and OPERATION RESCUE

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT MONICA MIGLIORINO (MILLER)

Of Counsel:

John W. Whitehead
Alexis I. Crow
The Rutherford Institute
1445 East Rio Road
Charlottesville, VA 22901
(804) 978-3888

Craig L. Parshall
Counsel of Record
The Rutherford Institute
910 Princess Anne St.
Law Building/Suite 105
Fredericksburg, VA 22401
(703) 371-4140

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QUESTION PRESENTED FOR REVIEW

Was the Second Amended Complaint, alleging Hobbs Act extortion under RICO, properly dismissed where neither it, nor Petitioners' RICO case statement, asserted facts showing that the alleged conduct of the Respondents, and Respondent Migliorino in particular, was objectively directed toward an economic goal, but rather, where such conduct was aimed at goals that were social or political in nature?

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

Respondent Monica Migliorino (Miller) is an individual, and has no parent or subsidiary companies. The Petitioners have accurately listed the parties to this proceeding.

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October Term, 1993

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v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT MONICA MIGLIORINO (MILLER)

OPINIONS BELOW

Respondent Monica Migliorino (whose married name is now Monica Miller) accepts the description, by Petitioners, of the opinions of the lower courts in this matter.

STATEMENT OF JURISDICTION

This Respondent accepts the Statement of Jurisdiction by the Petitioners.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and Constitutional provisions are in addition to those statutory provisions referred to by Petitioners, (Br. Pet. 1-3):

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Hobbs Act provides in pertinent part:

> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. 18 U.S.C. § 1951(b)(2) (1982).

18 U.S.C. § 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

STATEMENT OF THE CASE
THE LENGTH AND BREADTH OF THIS CASE IS EXTENSIVE

Petitioners' original action was filed on October 17, 1986. J.A.1. The Complaint alleged that the defendants, who are pro-life activists, and their pro-life organizations had violated

the Sherman Antitrust Act, 15 U.S.C. § 1 et seq. Respondent Monica Migliorino (hereinafter referred to as "Migliorino") was not named in the original Complaints, and no claims were asserted under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq.

Over the course of approximately three years discovery proceeded and numerous depositions were noticed by petitioners (R.130-140). Nearly three years later, the Petitioners filed their Amended Complaint, followed subsequently by Petitioners' Second Amended Class Action Complaint (hereinafter referred to as "Complaint") on September 22, 1989. J.A. 13, R. 236. In the amended pleadings Petitioners added additional pro-life activists and organizations as defendants, including Migliorino, and asserted claims under RICO as well as pendent state law claims.

Over objections filed by counsel, Migliorino's deposition was ordered to proceed (J.A. 14, R. 241) and her testimony commenced on October 11, 1989, extended into October 12, 1989, and was concluded on July 23, 1990.

By the time the trial court entered its Decision and Order dismissing this action in its entirety on May 28, 1991 (J.A. 36, R. 500) the Petitioners had served their third separate request for production of documents (J.A. 35, R. 485). All of the Respondents in this case have been deposed, sometimes multiple times, and numerous non-party witnesses have been deposed by Petitioners as well.

Two months before the dismissal of the action, on March 18, 1991, the Petitioners filed their RICO Case Statement (J.A. 87-117) in response to a trial court Order requiring that the Petitioners set forth the "facts" "in detail and with specificity" upon which the Petitioners relied, regarding twenty critical aspects of RICO claims (J.A. 81-86). The factual matters to be set forth by the Petitioners included a description of the misconduct of the Respondents, a designation of the subsections under

18 U.S.C. § 1962 (a)-(d) relied upon to posit RICO liability, a listing of all wrongdoers, a listing of the "alleged predicate acts and specific statutes which were alleged [sic] violated," a description of how the predicate acts formed a "pattern of racketeering activity," a description of the alleged "enterprise," and a description of the alleged victims and how they were injured (Id.).

THE ALLEGATIONS OF THE COMPLAINT

Four claims are asserted against Migliorino. The first, denominated as Count III, sets forth a claim for violation of § 1962 (c) of RICO. J.A. 72-73. The gist of the claim is that this Respondent participated in the affairs of the racketeering enterprise ("PLAN") through a pattern of racketeering activity consisting of predicate acts of "extortion" (Id. ¶109,99). These "extortionate" acts are alleged to constitute violations of 18 U.S.C. § 1951 (the "Hobbs Act"), J.A. 66 (¶97, which is realleged against Migliorino at ¶106, J.A. 72).

Migliorino's asserted "extortionate" conduct consists of the fact that she "took part" in, and was a speaker at a conference sponsored by PLAN, J.A. 54 (¶55), that she planned, and took part in a retrieval of the human remains of aborted babies from a loading dock of a pathology lab which provided disposal of the remains (the remains had been in a storage drum with "other medical waste" J.A. 58 (¶67), and that she conducted and publicized "funeral masses" and burial ceremonies for those remains, J.A. 57-61, at which time she is said to have further "threatened to disclose confidential information about previous patients of these clinics" (the confidential information is not specifically described, though the Petitioners considered it an "obvious" risk to the identities of patients) J.A. 60 (¶75), threatening to, and in fact releasing the names of the abortion clinics where the human remains were generated, J.A. 59-60, 69 (¶98j), and that, lastly, she pressured a landlord not to rent to an abortion clinic by sending letters "threatening disruption and

harassment" (ie. "pickets and demonstrations...sidewalk counselors...press coverage...") if the abortion clinic moved in. J.A. 61-62, 77 (¶125).

The second claim, Count V, asserts that this Respondent committed a state law tort of interference with a prospective economic advantage. J.A. 75-77. The final claim, Court VI, asserts a claim for state law tortious interference with an existing business relationship (relating to Migliorino's activities regarding the landlord and his decision whether to lease to an abortion clinic) J.A. 77-78.

In Count IV, Petitioners allege that Migliorino participated in a conspiracy to violate RICO, under § 1962 (d), but adds no additional substantive allegations, and does not name her as a defendant. J.A. 74.

MIGLIORINO'S ANSWER

Among other assertions, this Respondent denied any "theft" of the aborted remains J.A. 21, R. 314 (¶37 App. A2).

Petitioners' characterization of the actions of Respondents as theft evokes incredulity. Even the Petitioners admit that they were stored for waste disposal, and that the Respondents were told of the exact location of the remains by the pathology lab, and Migliorino and others were allowed to gather the remains under the watching eye of the employees of the lab, who "did nothing to stop" the retrievals. J.A. 58 (¶66-67).

Migliorino further asserted that the remains had been abandoned to public "disposal," R. 314 (¶67) (App. A2-3) and that the funeral masses and ceremonies were performed as an act of religious worship and faith:

> "Insofar as ...Migliorino (Miller) participated in the handling, funeral rites, burial of the unborn victims of abortion, she did so motivated by her religious belief and in the context of religious worship, believing that such funeral rites and burials were an act of charity

> and a work of mercy, affording such unborn victims a measure of recognition of individual worth and human dignity." (Id. at App. A4-5: Affirmative Defenses to Count I)

Migliorino further denied ever threatening to invade the privacy of abortion patients and asserted that she had taken steps to insure that any confidential information would not be revealed. R. 314 (¶75) (App A3).

This Respondent also asserted her First Amendment right to try to persuade a landlord not to rent his premises to an abortion clinic. *Id.* (¶77) (App. A3-4).

THE RICO CASE STATEMENT

The Petitioners set forth the full factual underpinnings of their case, subsequent to years of discovery, in their RICO Case Statement.

The "extortion" case against Migliorino can be reduced to eight allegations of purported predicate acts under RICO: (1) "Harassment" of persons at abortion clinics, J.A. 118-119, 121-122; (2) participation in, or organizing of clinic "blockades," J.A. 118-126 (ie. nonviolent sit-ins in front of abortion clinics) including incidents of "clinic invasion," J.A. 118-122 (not defined, but presumably entering into a clinic to advocate against abortion); (3) the wrongful taking of the human remains and (4) the burial of the remains of the aborted babies, J.A. 122-125; (5) causing publicity surrounding the funerals, J.A. 123-125; (6) being "featured as [a] "speaker" at a PLAN conference, J.A. 124; (7) having "Presented petitions signed by building patrons to landlords to threaten them to terminate [a] clinic lease," J.A. 120; and (8) being "associated" as a "volunteer" with PLAL, (Respondent Pro-Life Action League) J.A. 104.

A ninth allegation warrants special note. Throughout all the pleadings in this case, there is not one semblance of an allegation

of violence or threat of violence made directly against Respondent Migliorino. However, Petitioners allege that she was present at a demonstration where there was "destruction of clinic equipment and supplies." J.A. 120. Interestingly, it is stated that this was part of a "clinic blockade by 50 persons," Id. However, this Respondent's link to this event is not described. Presumably, Petitioners concede that she was not even arrested for this incident, as "six" unidentified persons were arrested, but Migliorino was not named as one of them.

This is significant, because Petitioners, elsewhere, do not hesitate to describe Migliorino's arrests: J.A. 118 ("municipal code" violation), J.A. 119, 122-124 (disorderly conduct), J.A. 120 (trespassing and disorderly conduct). No arrests or convictions relating to violence, or property damage are asserted against Migliorino, and no specific claim has ever been made against her that she has engaged in such conduct.

SUMMARY OF THE ARGUMENT

Reading the text of RICO in conjunction with its legislative history, which we believe this Court is compelled to do in light of its previous method of interpreting the statute and its interpretive jurisprudence in the analogous area of antitrust law, this Court should determine that dismissal of the Petitioners' Complaint is warranted.

RICO does not apply to social and political protest activities that are not, as an objective matter, directed toward an economic goal. Because the Petitioners have failed to allege, and after years of discovery they have been unable to assert, that any of the Respondents directed their actions toward financial objectives, they have failed to satisfy that test. This is particularly true with regard to Respondent Migliorino, who was affirmatively alleged to have been a mere "volunteer" in her pro-life activities in opposition to abortion.

In addition, most of the conduct alleged against Migliorino

is presumptively protected under the First Amendment, and as to the remaining allegations, they fail to assert that any of that conduct was directed toward "wrongful" goals, thus precluding a finding of "extortion" under the Hobbs Act, the only RICO predicate asserted by the Petitioners.

Lastly, the Petitioners have failed to assert any valid conspiracy claim against Migliorino under RICO.

This Court should affirm, in its entirety, the Court of Appeals judgment, dismissing the Complaint of the Petitioners.

ARGUMENT

I. THE SEVENTH CIRCUIT DECISION IS CONSISTENT WITH THIS COURT'S METHOD OF RICO CONSTRUCTION

A. Rico Construction Requires Analysis of both Text and Legislative History

The starting point, in determining the scope of RICO's reach, is the language of the text itself *(United States v. Turkette,* 452 U.S. 576, 580 (1981)). While unambiguous statutory language deserves construction according to its "plain meaning" (Id.), this rule is subject to at least two qualifications: First, even a text-bound interpretation must be considered in connection with any "...clearly expressed legislative intent to the contrary" (Id.).

Second, what is, or is not, a "plain meaning" in a statute is not necessarily self-evident. Merely because words used in a statutory sentence are plain in themselves does not necessarily yield a "plain" meaning of the statutory section *(FBI v. Abramson,* 456 U.S. 615, 625 n.7 (1982)). Further, this court has recognized that "[O]f course, there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language" *(Turkette* at 580).

This court, and its membership have expressed the recog-

nition that some portions of RICO have lacked "plain" meaning, at best, or at worst, were unconstitutionally vague. In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985), the Court noted the "failure of Congress and the courts to develop a meaningful concept of 'pattern' (relating to the meaning of "pattern of racketeering activity"). This Court made the same observation in *H.J. Inc. v. Northwestern Bell*, 492 U.S. 229, 236 (1989), and the concurrence in *H.J.* strongly implied that the "pattern of racketeering" element of RICO was unconstitutionally vague (*Id.*, 255-256 Scalia, J. concurring).

Problems of RICO's complexity and any lack of plain meaning is compounded by the unprecedented breadth of the Act. The "expansive uses" of civil RICO (*H.J.* at 492 U.S. 236) and the fact that "...in its private civil version, RICO is evolving into something quite different from the original conception of its enactors" (*Sedima*, 473 U.S. at 499), has been attributed primarily "to the breadth of the predicate offenses..." (*Id.* at 500; *H.J.* 492 U.S. at 236) utilized in RICO.

This breadth creates several concerns requiring particular caution by this court in considering RICO in protest contexts. The broader the attempted purview of a statute, particularly where the conduct proscribed may involve First Amendment activities, the clearer that statutory language must be, and the finer the legislative scalpel should slice between that government regulation which is allowed, and protected First Amendment conduct.

In *N.A.A.C.P v. Button*, 371 U.S. 415, 438 (1963), this Court noted that "[P]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," and that in First Amendment areas "government may regulate in the area only with narrow specificity," (*Id.* at 371 U.S. 433. Commentators have noted First Amendment abuses under RICO:

"[T]he broad use of civil RICO is eroding areas that

> have traditionally been granted the most careful constitutional protection. Whereas a picketer once was free to express his views so long as he did so nonviolently, today he can be held liable under the racketeering laws for so nebulous and passive an act as inducing fear in the object of his picket." (Note, *Limiting Political Expression by Expanding Racketeering Laws: The Danger of Applying a Commercial Statute in the Political Realm*, 20 Rutgers L.J. 201, 203 (1988)).

Further heightening the need for judicial caution in this case is the fact that RICO contains, even in its civil provisions, "drastic remedies," (including treble damages, and the awarding of costs and attorney's fees (18 U.S.C. § 1964 (c) *(H.J.* at 492 U.S. 233).

It has been noted that "civil RICO's treble damages were meant not to reform or regulate racketeers, but to ruin them," Turley, *Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation*, 29 Wm. & Mary L. Rev., 481, n.189 (1988), citing: 116 Cong. Rec. 819 (1970) (Remarks of Sen. Scott) (civil RICO's "purpose is to eradicate organized crime in the United States"); *Id.* at 35,199 (remarks of Rep. Rodino) (civil RICO makes "a truly full-scale commitment to destroy the insidious power of organized crime groups"); *Id.* at 35,300 (remarks of Rep. Mayne) (civil RICO's stands for the proposition that organized crime "must be sternly and irrevocably eradicated"), cited in *United States v. Turkette*, 452 U.S. 576, 589 n.11 (1981).

In *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60 (1989) this Court raised, but did not decide (citing the lack of "ripeness") the question of whether civil sanctions under RICO were so severe as to be unconstitutional. At a minimum the undisputed severity of these penalties should give this Court pause in deciding the targets at which RICO's artillery will be

aimed, particularly in the context of protest movements directed at political or social reform.

The methodology of RICO interpretation utilized in this case must preserve the proper scope and congressional intent of RICO, while cautiously protecting fundamental constitutional rights. A proper methodology of RICO construction will prevent federal law from being used as a retaliatory weapon in political battles[1], while still preserving its use in conformity with Congress' original intent to bring against all multi-faceted forms of organized crime, "the pressure of private attorneys general' on a serious national problem, for which public prosecutorial resources [were deemed inadequate]," *(Agency Holding Corporation v. Malley-Duff & Assocs., 483 U.S. 143, 151 (1987)* cited in *Holmes v. SIPC, ___ U.S. ___, 112 S.Ct. 1311, 1323, (1992)* (O'Connor, J. concurring). No clear, expressed answer to the question presented by the granting of certiorari in this case can be produced by a cursory examination of the statutory language, any more than there could have been a purely textual answer to the question presented in *Holmes v. SIPC,* ___ U.S. ___ 112 S.Ct. 1311 (1992) where this Court determined that the petitioner lacked standing to bring a RICO civil suit, based on concepts of proximate causation. Proximate cause was nowhere to be found in the *explicit* text of the statute, although it was

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[1] One commentator, referencing the use of RICO against pro-life activists, has noted that:

> "At least until (or if) the final death knell sounds for *Roe v. Wade*, or civil RICO is significantly changed, it is likely that civil RICO will offer the most potent legal weapon in the reproductive rights arsenal." Yonover, *Fighting Fire With Fire: Civil RICO and Anti-Abortion Activists*, 12 Women's Rights Law Reporter 155 (1990)

That commentator noted that "the escalation of civil RICO litigation is hardly surprising. RICO provides some extraordinary 'carrots' for plaintiffs: recovery of treble damages, costs, reasonable attorney's fees, availability of federal jurisdiction, and the possibility of nation-wide service of process." (*Id.* at 157) (footnotes omitted).

found to have been presuppositional and implicit in the RICO text defining those persons who could bring RICO lawsuits in 18 U.S.C. § 1964 (c).

RICO neither expressly contains language broadening its scope to include non-financially motivated political and social activists, nor does it, by its express language, exclude such persons.

Plaintiffs incant the "liberal construction" directive of RICO, apparently as the *fait accompli* of their arguments for an overliberalized construction of RICO. (Br. 19). However, Petitioners confuse liberal construction with license for statutory novelty. Speaking of the "liberal construction" clause, this Court recently noted:

> "[T]his clause obviously seeks to insure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended." *(Reves, et al. v. Ernst & Young*, ___ U.S. ___, 113 S.Ct. 1163, (1993)).

Liberal construction will not justify hobbling the remedial purpose of RICO by opening the door to massive and complex damages litigation which would not only burden the Courts, but would undermine the effectiveness of treble damages suits *(Holmes, Supra)*.

While we believe that respondents' interpretation of RICO, construing it to include the requirement that RICO "extortion" be directed at an economic goal, is superior to Petitioners' theory, nevertheless, even if we were to concede (arguendo) that Petitioner's interpretation is "equally plausible", we believe that resort to legislative history of RICO is necessary, together with construction of its textual terms, in order to resolve the question presented by this case. Where, "on the face of the statute" there are two "equally plausible" constructions of the statute (*FBI* at

456 U.S. 624), this Court should select that construction that "more accurately reflects the intention of Congress, is more consistent with the structure of the Act, and more fully serves the purposes of the statute." (*Id.* at 625).

This Court has not hesitated, on repeated occasions, to refer to the "legislative history" of RICO in construing a wide variety of questions presented to it (*Sedima* at 473 U.S. 486-488; *Holmes* at 112 S.Ct 1316-1318; *Turkette* at 452 U.S. 588-593; *H.J.* at 492 U.S. 236, 239-240). This case presents another such occasion. We believe that because there is no clear, express answer on the face of the text of RICO itself, to the issue presented for certiorari, and because, at best, Petitioners' interpretation of RICO is only as (if not less) "equally plausible" as Respondents, this Court must consider, in addition to the text, the legislative history of RICO in arriving at an answer.

B. Evidence for an economic requirement in RICO is found in the structure of the text

The definition of "person" is a key element in the RICO scheme. "Person" is referred to with regard to potential plaintiffs in § 1964 (c). "Person" is also utilized when referring to potential defendants (§ (a)-(d). The definition of "person" under RICO is inherently and necessarily linked to the overriding presumption that the wrongs suffered by potential plaintiffs under RICO, and occasioned by the conduct of potential defendants under RICO, have to do with economically directed conduct.

"Person" in RICO is defined, for all purposes, as "any individual or entity capable of holding a legal or beneficial interest in property." (§ 1961 (3)). There is no reason for Congress to have included a specific definition of both potential plaintiffs and potential defendants that *required* the capacity to hold legal or beneficial property rights if RICO had been intended to extend to non-economic conduct. Clearly, the scope of RICO was intended to reach only those "persons" whose

conduct was intrinsically tied to property interests and economic goals.

The categorization of potential RICO plaintiffs under § 1964 (c) also gives us a clue that RICO is structured for, and designed against, only economically directed conduct. § 1964 (c) allows for recovery in civil actions for "any person injured in his *business or property...*" (emphasis added). Lawsuits for purely personal, physical or emotional damages or other intangible interests are not permitted by the language of § 1964 (c). This is another strong indication that RICO was not designed for activities of the type alleged in Petitioners' complaint.

Further, the use of "enterprise" in §§ 1962 (a) and 1962 (b), "clearly refers to the sort of entity in which funds can be invested and a property interest of some sort acquired, and hence the sort of entity which one joins to make money" *(U.S. v Ivic,* 700 F.2d 51, 60 (2nd Cir. 1983)). The Court in *Ivic* rightly applied the rule of statutory construction that where the same word is used in the same section more than once, and the meaning is clear in one place, the same meaning should be applied in the other places (*Id.*), thus concluding that an economic presumption underlying the concept of "enterprise" in § 1962 (a) should be equally applicable to civil RICO actions under § 1962 (c) where the economic aspect of "enterprise" is not quite as textually clear.

C. The legislative history of RICO clearly indicates that the social activism of the Respondents in this case is outside of the scope of RICO

This Court has avoided interpretations of RICO that would be "inconsistent with Congress' underlying policy concerns" (*Sedima,* 473 U.S. at 493).

It is without dispute that Congress had no intention to focus the heavy litigation artillery of RICO at conduct aimed at social or political reform. This court has recognized that:

> "To be sure, Congress focused on, and the examples used in the debates and reports to illustrate the act's operation concern, the predations of mobsters. Organized crime was, without a doubt, Congress' major target as we have recognized elsewhere." *(H.J.* at 492 U.S. at 245) (citations omitted)."

While it is one thing for this Court to eschew limiting the application of RICO to organized crime, though organized crime was its "focus" (*Id.* at 248), it is quite another thing to say that the presumption that underlaid RICO that the crimes within its scope were economic crimes should have no limiting function.

While this Court has repeatedly indicated that it would not add any additional elements not found within the text or statutory history of RICO (eg. *Sedima* and *Turkette*), it has defined elements of proof implicit in RICO that arguably add elements of proof to the RICO scheme (to wit: *H.J.* with regard to the non-statutory elements of "continuity" and "relationship" found to be implicit in the definition of "pattern of racketeering"; and *Holmes*, where this Court imputed to the statutory language of "by reason of" (in § 1964 (c)), the elements of proximate causation requiring some proximate causation relationship between the conduct of the defendant and the injury to the plaintiff, in order to create RICO liability).

D. Conclusion

This Court has avoided adding elements of proof to RICO where such additional elements were inconsistent with the text and legislative history of the Act. It has, nevertheless, construed RICO to include limitations on its scope where such limitations were consistent with its purposes, and particularly where clued by some "positive sign" in its language or legislative history (*Turkette* 452 U.S. at 593). Here, we have strong evidence for both.

II. REQUIRING THAT CONDUCT UNDER RICO BE ECONOMICALLY DIRECTED IS CONSISTENT WITH THIS COURT'S TREATMENT OF ANALOGOUS LAW

A. The Analogy to Antitrust Law

The analogy between RICO and Antitrust law was noted in *Holmes*, *Supra* 112 S.Ct. at 1317 where this Court observed that Congress modeled § 1964 (c) of RICO (relating to treble damages, attorneys' fees and costs) and the standing requirements of plaintiffs after § 4 of the Clayton Act, which entitled recovery to anyone who "shall be injured in his business or property by reason of...the wrongful conduct". In *Holmes*, this Court held that the very same "reasons that supported conforming Clayton Act causation to the general tendency [of the law to limit damages to direct, rather than remote causes] applied just as readily" to RICO (*Holmes* at 1320). Petitioners have conceded the close parallel between RICO and antitrust laws. (Br. Pet. 35 n.27)

Accordingly, just as proximate causation principles which had been found to apply as a limitation on the scope of antitrust were applied to RICO, so too, exemptions regarding conduct directed at social and political reform under *N.A.A.C.P. v. Claiborne Hardware Inc.* 458 U.S. 886 (1982) and *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.* 365 U.S. 127 (1961) should be similarly applied to RICO. This Court has also recognized the analogy between antitrust law and RICO in *Sedima*. In that case, relying heavily on the analogy between RICO and predecessor antitrust laws, this Court found that the "clearest current" of legislative history flowing through the enactment of RICO showed a reliance by Congress on the Clayton Act, in separating government prosecutions from civil actions under RICO (*Sedima* at 489). Utilizing the analogy to antitrust, this Court in both *Holmes* and *Sedima* made substantive law determinations with regard to the patterns of liability

that would be cognizable under RICO. So too, in this case, in recognition of the analogy between antitrust law and RICO, this Court should apply similar exemptions protecting social and political reform activism from the scope of this broadly sweeping law.

B. The Political/Social Conduct Exemption Under the Sherman Act Should Apply Similarly to RICO.

The Sherman Act has been construed very broadly (*Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975)). Yet, despite the breadth of the application and construction of the Sherman Act, logical limitations have been imposed on its scope (*Summit Health, Ltd. v. Pinhas*, ___ U.S.___, 111 S.Ct. 1842, 1846 n.10 (1991)).

One of those limitations is in the nature of an antitrust exemption for social/political activism.

In *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) (cited by the 7th Circuit decision in our case, *National Organization For Women v. Scheidler*, 968 F.2d 612, 617 (7th Cir. 1992)), this Court held that the Sherman Act did not apply to employees engaged in a violent sit-down strike in which numerous state law felonies were committed and which resulted in shutting down a company which produced a large percentage of the nation's hosiery. Among the illegal acts of the union members were the changing of locks and destruction of property and equipment, resulting in the plant being shut down for some two months after the Plaintiff regained possession (*Id.* at 482). The purpose of the union action was to force the Plaintiff company into hiring only union employees (*Id.* at 482). The Supreme Court held that wrongful conduct, if it is to be swept within the scope of the Sherman Act, "must be aimed or directed at the kind of restraint which the Act prohibits or that such restraint is the natural and probable consequences [sic] of the conspiracy" (*Id.* at 511, citing *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 471 (1922)).

Similarly, we believe that RICO should only apply to conduct which is "aimed or directed at" an economic or business goal as a result of enumerated predicate acts, or where commission of such predicate acts creates as a "natural and probable consequence" the type of economic harm sought to be avoided by Congress.

The Court in *Apex* emphasized that wrongful acts not within the intended reach of the Act "are not brought within its sweep merely because, without other differences, they are attended by violence" *(Apex* at 513).

Similarly, despite the broad and vitriolic characterizations by Petitioners, the egregious conduct alleged against the Respondents (Br. 4-7) is insufficient, in itself, to confer RICO liability based on the Respondents' activities as a whole, much less on the benign and non-violent conduct of Monica Migliorino.

In *N.A.A.C.P v. Claiborne Hardware Co.,* 458 U.S. 886 (1982), the Court recognized that boycotts organized by black citizens against white merchants, which were sometimes attended by violence and property destruction, were beyond the reach of the state versions of the Sherman Act (*Id.* at 913). One of the keys to *N.A.A.C.P.*, (and, we believe, an analytic key by which this court can unlock the answer to the question presented for certiorari), is the recognition in *N.A.A.C.P.* that:

> "While states have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case. This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values'...[S]peech concerning public affairs is more than self-expression; it is the essence of self-government...There is a 'profound national commitment' to the principle that 'debate on public

issues should be uninhibited, robust, and wide open'"
(*Id.* at 913) (ellipses added, citations omitted).

The recognition in *N.A.A.C.P.* that while the states have broad power to "regulate *economic* activity" they do not have a comparably broad right to regulate non-economically directed conduct aimed at social or political reform, applies with equal force to the enforcement of federal laws. The Court in *N.A.A.C.P.* further indicated, relative to First Amendment rights, that "we cannot of course lightly impute to Congress an intent to invade those freedoms," (*Id.*) citing *Eastern Railroad President's Conference v. Noerr Motor Freight*, 365 U.S. 127 at 137-138 (1961). In *Eastern Railroad President's Conference* this Court exempted from the Sherman Act a false publicity campaign waged by railroads against the trucking industry intended to foster the adoption of laws destructive of the trucking business.

Respondent Migliorino is charged with eight categories of conduct which allegedly form a basis for her RICO liability in this case. None of this conduct was directed or aimed primarily at an economic goal. Five of the categories involved: (1) giving humane burial to the human remains resulting from abortion, (2) publicizing those burials of aborted babies, (3) participating as a speaker in a PLAN convention, (4) presenting petitions by tenants to a landlord in an attempt to induce the landlord not to rent his building space to an abortion clinic, and finally, (5) having been "associated" with PLAL as a "volunteer", all presumptive First Amendment activities that fall outside of the scope of RICO.

As to the other three categories of wrongdoing alleged against Respondent Migliorino not necessarily protected by the First Amendment on a *presumptive basis*, these are limited to allegations of: (1) The taking of human remains, characterized by Petitioners as the crossing of state lines "to wrongfully take fetal remains from Vital-Med"; (2) "Harassment" of persons outside of clinics (a term not defined by Petitioners); (3) Various

acts of "clinic blockade" either personally, or through her alleged help in organizing those blockades, including the vague assertion of clinic "invasions" (see our Statement of the Case at 6).

In addition to the fact that none of these alleged wrongful acts constitute extortion under the Hobbs Act, which is the only predicate alleged by the Plaintiffs supporting their RICO claims (see further argument at 32-38 of this brief), such allegations are similar to the allegations in *Apex Hosiery* and *N.A.A.C.P.*[2] None of the allegations against Respondent Migliorino assert acts of violence of any kind by her. Migliorino's abortion opposition is non-violent, non-economic and morally based. It should be held to lie outside the scope of RICO in the same way that the conduct of the protestors and activists was held to lie outside of anti-trust laws in *Apex* and *N.A.A.C.P.*

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[2] While the Court in *N.A.A.C.P.* did indicate that "the First Amendment does not protect violence", it further noted that "while the state legitimately may impose damage for the consequences of *violent* conduct, it may not award compensation for the consequences of *non-violent*, protected activity. Only those losses proximately caused by the unlawful conduct may be recovered" (*N.A.A.C.P.* at 918, emphasis added). The Court also noted the requirements of "precision of regulation" in separating and dividing those damages proximately caused by clear proof of violent, unlawful activity as opposed to protected activity. (Id.)

III. EXCLUDING THE CONDUCT OF THIS RESPONDENT FROM RICO WILL PROTECT IMPORTANT FIRST AMENDMENT PRINCIPLES

A. Most of the alleged wrongful conduct of Respondent Migliorino is presumptively protected under the First Amendment.

1. PETITIONING THE LANDLORD

Migliorino is alleged to have committed the predicate act of extortion, underlying the RICO claim under § 1962 (c), by reason of having "presented petitions signed by building patrons to landlords to threaten them to terminate clinic leases" in 1986 in Milwaukee, Wisconsin (RICO Case Statement, Exh. A. J.A. 120). This activity is described in the Complaint as "...Migliorino sent letter directly to the landlord and to other tenants, threatening disruption and harassment if Summit [abortion clinic] were allowed to move in to the building." (Complaint, ¶77, J.A. 61)

Petitioners do not define "disruption" and "harassment". This is significant, because disruption and harassment are, like so many other aspects of the abortion controversy, a function of the perspective of the viewer of the demonstration in question. The fact that Petitioners would assert that "threatening disruption and harassment" at the site of an abortion clinic constitutes extortion as a predicate act for RICO liability shows the great lengths to which the Petitioners are willing to stretch the scope of RICO beyond any recognizable form, shape or substance. It is clear, however, that what Petitioners mean here, is that Migliorino's communication to the building tenants (which in turn caused them to object to the Landlord about the abortion clinic) warned that events such as "weekly pickets" and encounters with "sidewalk counselors" and even "sit-ins", together with "press coverage" would likely become a reality if the abortion clinic re-located into the building (J.A. 77, ¶125).

Petitioners then, denominate this communication as a threat of "harassment". "Harassment" unfortunately suffers the semantical fate of perpetual re-definition with every wind of change in the prevailing climate of popular opinion. One citizen's "harassment" may be another's mere trifling annoyance. Yet it is "[a] function of free speech...to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *(Terminiello v. Chicago,* 337 U.S. 1, 4 (1949)).

Official regulation of expression is unconstitutional, even though it is intended only to restrict disorderly conduct or "fighting words", where its effect is to allow punishment for expressive conduct that is simply annoying or offensive. *(Houston v. Hill,* 482 U.S. 451 (1987); *R.A.V. v. City of St. Paul,* ___ U.S. ___ 112 S.Ct. 2538, 2560 (1992) (White, J., concurring)).

Significantly, Petitioners do not allege Migliorino ever "threatened" force or violence against any clinic or any clinic personnel. Thus, Petitioners would have this Court impose the awesome remedies of RICO against a pro-life activist who tells a landlord of a building that if an abortion clinic moves into the building, that there will probably be pickets, perhaps blockades, the presence of police officers, and a high visibility of news coverage. Can Petitioners seriously argue that such conduct does not implicate the First Amendment?

Even if Petitioners' Complaint did allege that Migliorino used a threat of force (which, after many years of litigation, amendments to the Complaint and a voluminous RICO case statement, is an assertion that Petitioners have never specifically made against Migliorino), unless it can be shown consistent with the face of the pleadings that Migliorino used "[a]dvocacy [that was] directed to inciting or producing imminent lawless action and is likely to incite or produce such action" *(Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969)) such advocacy (even if couched

in terms of a "threatening" exhortation) may not be sanctioned under force of law. It is clear that after asserting presumptively protected First Amendment advocacy on the part of Migliorino, Petitioners have failed to provide any explanation as to how such conduct can be penalized without affronting guarantees of free speech.

Nor is the fact that Migliorino is alleged to have used "threats" of disruption and harassment determinative of protection under the First Amendment. As the Court stated in *N.A.A.C.P.* (Supra):

> "The claim that the expressions were intended to exercise a coercive impact [on the injured party] does not remove them from the reach of the First Amendment" (*Id.* at 910-911, quoting from *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

We would submit that the "threat" of generalized disruption and harassment that attends most abortion clinics, given the present social and political realities of abortion as the most divisive public issue of the last two decades (*Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040, 3079 (1989) Blackmun, J., dissenting and concurring in part), is analogous to "threats" of the same kind of harassment and disruption secondarily caused by boycotts which were considered protected First Amendment activity in *N.A.A.C.P.*

2. ADVOCACY ACTIVITIES

The second category of presumptively protected First Amendment conduct which Petitioners attempt to sweep within the purview of RICO is Migliorino's alleged activities in having "traveled throughout the country leading efforts to shut down women's health centers such as DWHO and Summit and encouraging the use of unlawful methods to do so." (J.A. 4 Complaint, ¶30). However, mere advocacy of the positions that abortion clinics should be "shut down", even to the extent of

"encouraging others to do so", is still presumptively protected under the First Amendment, unless it fails the "clear and present danger" test *(Brandenburg, Supra)*. As the Seventh Circuit indicated in this case:

> "Finally, selling materials advocating a particular viewpoint, even if the materials advocate illegal actions, is not a predicate racketeering activity. Therefore, income derived from the sales is not income derived from racketeering activity. Moreover, unless the materials violate the "clear and present danger" test, the distribution is protected by the First Amendment. *Cf. Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940)." (968 F.2d at 630)

The second example of advocacy alleged as a basis for RICO liability of Migliorino is the fact that she and other Respondents "were speakers at a convention of the Pro-Life Action Network (PLAN) (J.A. 54-55, Complaint, ¶55;). That any liability of Migliorino, posited merely because she was a speaker at a convention sponsored by PLAN, is subject to (and is protected under) the "clear and present danger" rule above cited, would appear to be almost too obvious for elaboration.

The third example of Migliorino's advocacy of her pro-life position being used as a grounds for RICO liability is the assertion that she "publicized possession of fetal remains taken from Vital-Med" (J.A. 123-125).

With regard to this assertion, we are reminded of the Court's comments in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2nd Cir. 1990). In that case, the Court rejected the town of West Hartford's attempt to utilize RICO (and Hobbs Act extortion) against pro-life protestors. One of the allegations of "extortion is that the Defendants had publicized allegations of police brutality against them while being arrested during pro-life activities and blockades outside of abortion clinics. Specifically, the Complaint alleged that several of the

Defendants "deliberately and maliciously sought to extort a less diligent response to future protests by falsely indicating to newspaper reporters that the West Hartford police department had beaten protestors with clubs." (*Id.* at 96). The Court noted:

> "We also note the First Amendment implications of any ruling, that, for example, the publication of a paid advertisement alleging police brutality (See complaint Para. 80) violates a federal statute which defines a felony punishable by twenty years imprisonment..." (*Id.* at 102).

Beyond even the obvious First Amendment protections for Migliorino's publicizing the fact that unborn babies had been aborted and were being buried ceremoniously and humanely, is that Petitioners have recklessly argued that "the Defendants..threatened to disclose publicly the identities of the women who conceived the fetuses." (Br. Pet. 6). None of the pleadings in this case make any such allegation.

The Complaint alleges, rather, that Migliorino stated her intention to, and in fact did, release the names of abortion clinics from which the aborted babies had come. (J.A. 59 ¶71, 72).

To state, however, that such communications by Migliorino constituted "extortion" is simply and purely nonsense. That abortions occurred, and that human fetuses were aborted at the Petitioners' clinics is a tautology. To further link the aborted babies that were being buried with those clinics should have created no more "fear" to the Petitioners under the Hobbs Act than stating that the aborted babies from the Petitioners' clinics were being disposed of by a waste disposal service.

Nowhere in the Complaint or the RICO Case Statement is the assertion made that Migliorino ever directly or impliedly threatened to release the names of mothers who had abortions,

and in any event the implication is flatly denied by Migliorino's Answer (App. A3).

The only statement in any of the pleadings even relating to identity of mothers is the allegation that Respondent Scheidler "was widely quoted as saying" that the aborted remains were "individually packaged and labeled..with the names of the mothers, doctors, dates and places the abortions were performed." (J.A. 59 ¶70). Somehow, Petitioners believe such an assertion can, fancifully, be transformed into "an obvious threat to women...that their privacy would be invaded and the confidentiality of their treatment breached by having their names and personal medical information revealed publicly" (J.A. 60 ¶75).

3. ASSOCIATIONAL RIGHTS

The third category of presumptive First Amendment activity which Petitioners allege against Migliorino as a basis of RICO liability is the assertion that she was "associated with PLAL as a volunteer in PLAL-approved and PLAL-sponsored activities" (J.A. 104). Petitioners further allege that Migliorino was part of the PLAN enterprise (J.A. 100). However, the Petitioners fail to outline what Migliorino's actual association with PLAN was, other than the multiplistic allegation that "PLAN has functioned through annual meetings in which Scheidler, Scholberg, Murphy, Terry, *Migliorino* and co-conspirator Ryan have participated as organizers, leaders and/or speakers..." (J.A. 101) (emphasis added).

If Petitioners intent in making these multiple and vague allegations is to obfuscate the nature of the participation of Respondents such as Migliorino, they have surely succeeded.

However, by matching the above reference taken from the RICO Case Statement with the specific allegations against Migliorino in the Petitioners' Complaint, we see that Migliorino's *only* involvement with PLAN was as a speaker.

Petitioner's Complaint alleges that Migliorino's only specific association with PLAN was from August 25 through August 27, 1988, where she "took part" in a PLAL-sponsored PLAN convention in Chicago, Illinois. (J.A. 54). It is alleged that other Respondents "and Migliorino were speakers." (*Id.*). Thus, the sole and single specific allegation connecting Migliorino with the PLAN enterprise is a general associational reference in the RICO Case Statement, which is only elucidated by the allegations in the Complaint that she was a speaker at one of their conventions. Migliorino's involvement with regard to the retrieval, burial and publicity of fetal remains (J.A. 57-59) and her conduct in petitioning a landlord against leasing building space to an abortion clinic (J.A. 61) are not tied in any manner to the activities or affairs of the PLAN enterprise, but are solely attributed to the individual conduct of Migliorino. All of the other activities in creating the PLAN enterprise (J.A. 49-53) specifically exclude Migliorino. Furthermore, the "carrying out" of PLAN's agenda, including the activities of Operation Rescue (J.A. 55-57) also exclude Migliorino.

Of course, this Court has clearly indicated that RICO may not be used to sue outside consultants (accountants, lawyers, etc.) who commit fraud for a business enterprise if they did not personally participate in the management or operation of that business enterprise (*Reves v. Ernst & Young*, ___ U.S. ___, 113 S.Ct 1163 (1993)).

Thus, if Petitioners are still asserting RICO liability against Migliorino with reference to the PLAN enterprise (which they obviously are) they must be asserting that her activities as a speaker at a PLAN convention constitute sufficient management of the affairs of the enterprise to impose liability.

Not only is that assertion out of step with *Reves*, but it ignores the presumptive First Amendment protection Migliorino enjoys under the "clear and present danger" line of cases (eg. *Brandenburg v. Ohio, etc.*).

The jurisprudence of this Court regarding the freedom of association under the First Amendment does not comport with Petitioners' theory. "The First Amendment similarly restricts the ability...to impose liability on an individual solely because of his association with another" *(N.A.A.C.P., Supra,* at 919) (citations omitted). In order "to punish association" with a group that has illegal aims "there must be 'clear proof that a Defendant specifically intend[s] to accomplish [the aims of the organization] by resort to violence.'"; and such intent must be judged only by the "strictest law" so as to protect those who, while associating with an organization that has unlawful aims, wishes to limit his or her association to the lawful aims of that organization *(Id.)* (citations omitted).

There is a complete and total absence of any allegations in this case that Migliorino has any intent to accomplish the aims of any organization (including PLAN) by a resort to physical violence or force. Her only connection with PLAN having been her activity as a speaker in a convention, Migliorino's alleged connections with the PLAN enterprise is insufficient to predicate any RICO liability in this case.

4. THE BURIALS

The fourth type of conduct alleged as a RICO predicate which is presumptively protected under First Amendment principles are the assertions relating to Respondent Migliorino having arranged the burial ceremonies for aborted babies whose remains were retrieved from the Vital-Med loading dock.[3]

Petitioners have apparently retreated from the position clearly outlined in their Complaint: that the funeral ceremonies

[3] Plaintiffs assert that Migliorino and other Respondents "stole" more than 4,000 aborted remains from the Vital-Med laboratory loading dock where they were prepared for pick-up and ultimate disposal in trash and waste disposal sites (Br.Pet.6). The *manner* of the retrieval will be covered in later arguments in this brief regarding the lack of proof that extortion took place under the Hobbs Act with regard to any of Migliorino's activities.

conducted by Migliorino of the remains of aborted babies were somehow (incredibly) an act of extortion, thus imposing RICO liability. We could, of course, speculate that such a retreat may have been precipitated by the embarrassing recognition that this single body of allegations, perhaps more than any other aspect of the case, exposes, *reductio ad absurdum*, the outer limits of Petitioners' leap from logic.

Petitioners have asserted in their RICO Case Statement that Migliorino "engaged in a pattern of extortionate activities" which served as a predicate for RICO liability in that, among other things, she was involved in "the unlawful taking and parading of fetal remains..." (J.A. 88). It is further alleged that extortion was committed by "storage, transportation, and disposal of fetal remains taken illegally..." (J.A. 95).

Finally, Petitioners, in their RICO Case Statement, allege that "those who have unlawfully taken fetal remains and stored, transported and disposed of those remains have done so as part of the conspiracy to deprive clinics, patients, clinic personnel, and doctors of their respective rights to provide and receive abortions." (J.A. 97).

Migliorino is singularly alleged to have developed a "plan to steal and then publicize the stolen fetal remains" (J.A. 61, ¶77). Migliorino is alleged to have retrieved the aborted remains (J.A. 58 ¶66-68) and to have "arranged a September 10, 1988 ceremony and burial for a reported 1,200 fetuses." (J.A. 59, ¶71).

In response to Petitioners' Complaint (*Id.*) Migliorino, in her Answer to Second Amended Complaint (J.A. 21 App. A1-4) affirmatively conceded that she arranged funeral rites and burial of many unborn children killed in abortion. (R.314 App. A4). She further stated affirmatively that "Insofar as Defendant Monica Migliorino (Miller) participated in the handling, funeral rites and burial of the unborn victims of abortion, she did so motivated by her religious belief, and in the context of religious worship, believing that such funeral rites and burials were an act

of charity and a work of mercy, affording such unborn victims a measure of recognition of individual worth and dignity." (*Id.*, App. A4).

Significantly, Petitioners, in their own allegations in the Complaint, set forth the presumptively religious nature of Migliorino's act in having "arranged a...*ceremony* and burial..." (J.A. 59, ¶71), and funeral "masses" (J.A. 69 ¶98j).

The primary dictionary definition of "ceremony" includes the reference to "religious rite" *(Webster's New World Dictionary*, 1968), and "masses" are thoroughly religious in nature (*Id.*).

The concept of *"burial"* has historically religious implications under the common law. Traditionally, "the leaving unburied the corpse of a person for whom the Defendant is bound to provide Christian burial, as a wife or child, is an indictable misdemeanor, if he is shown to have been of ability to provide such burial. 2 Den. Cr. Cas. 325." *(Bouvier's Law Dictionary*, 1940).[4]

That Petitioners have targeted the religious rites performed

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[4] "Both burial and cremation were widespread practices at various dates and places in antiquity . . . In the Semitic East burial was always predominant. In Asia Minor the tomb was conceived as the eternal house of the dead . . . The practices of later Judaism were closely based upon the OT and early custom. . . Scrupulous care was taken to let none be unburied (Josephus, *contra Apionem* 2, 29, 211 etc.)" 1 *Dictionary of the New Testament Theology*, Bury, 264 (1981).

Nor, does Migliorino's protection under the Free Exercise Clause of the First Amendment cease for these burials solely because she was not related by blood to the tiny corpses that she was burying. Under the theology of Migliorino's tradition, "it was deemed a good work to make special provision for the burial of strangers...(Matt. 27:8)" (*Id.* at 265). Her Catholic doctrine teaches that "The corpses of human embryos and fetuses, whether they have been deliberately aborted or not, must be respected just as the remains of other human beings." (*Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation*, Congregation for the Doctrine of the Faith, St. Paul Editions, pg. 18, Feb 22, 1987).

by Migliorino as an act of "extortion" signals that Petitioners are guilty of "an attempt to disfavor [Migliorino's] religion because of the religious ceremonies it commands..." *(Church of the Lukumi Babalui Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 113 S Ct. 2217 (1993))

Like the Petitioners' reference to Migliorino's conducting of burial "ceremonies" and "masses", the use of the words "sacrifice" and "ritual" in the *City of Hialeah* ordinance was "consistent with the claim of facial discrimination" against practitioners of a religious group. (*Id.*).

That the Petitioners target a religious ceremony conducted by Migliorino and characterize it as an act of extortion shows how far the Petitioners will go in attempting to stretch RICO beyond any recognizable limit. Migliorino's concern for the aborted dead is understandable also, in light of the undignified and in some cases outrageous, handling of human remains as the result of abortions which has been documented.[5]

Finally, Petitioners argument that the activities of Migliorino in having arranged for the human aborted remains to have been "given local burial amidst a media campaign designed to generate negative publicity for women's health clinics generally and for affiliates of DWHO and Summit, specifically," (J.A. 60, Complaint, 73) is similar to the argument of Planned Parenthood, which was rejected by the 8th Circuit Court of Appeals in *Planned Parenthood of Minnesota, et al. v. State of*

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[5] Several dozen aborted babies were discovered in a garbage dumpster behind a Milwaukee abortion clinic. When asked by police who were called to the scene what they were doing, the children who discovered the aborted babies in the dumpster innocently indicated that they had been playing with the "little people." (Migliorino, *Report from Rat's Alley: Down and Out With the Unborn In Chicago and Milwaukee*, Fidelity (July-August, 1987)).

One report from Associated Press indicated that two passers-by had discovered 173 "partially burned fetuses" in a field formerly owned by a doctor *(Los Angeles Times*, April 16, 1992, A-24).

Minnesota, et al, 910 F.2d 479 (8th Cir. 1990). In that case, Planned Parenthood attempted to strike down as unconstitutional, the Minnesota Fetal Disposition Law, Minn. Stat § 145.1621 (1988). One of the arguments advanced, and the response by the Court, are noted as follows:

> "We also do not accept Planned Parenthood's argument that the statute creates an impermissible psychological burden by equating abortion with murder...Planned Parenthood's argument that the state's conclusion that fetal remains are the equivalent of human remains is also unavailing. We cannot agree that the Minnesota legislature intended to convey meaning beyond acceptance of common terms. However, even assuming this is a true purpose, we do not find it to be an invalid purpose. A state may make a value judgement favoring childbirth over abortion. *See Webster*, 109 S.Ct. at 3050." *(Id.* at 478-489).

While Migliorino's conduct in providing honorable burial for the aborted human remains offends the sensibilities of Petitioners, it is incomprehensible to believe that such acts extorted anyone's rights, causing injury to "business or property" under RICO.

IV. PETITIONERS HAVE FAILED TO SHOW THAT MIGLIORINO COMMITTED EXTORTION THROUGH THE "WRONGFUL" USE OF FEAR UNDER THE HOBBS ACT

A. The Reasoning in *U.S. v. Enmons* Should Apply to this Case

The only predicate acts that the Respondents are alleged to have committed are those acts that Petitioners contend are in violation of the Hobbs Act. J.A.66 (Complaint ¶97). In their RICO Case Statement, Petitioners unambiguously state that "These acts violate the Hobbs Act, 18 U.S.C. § 1951." J.A.91.

While Amicus Curiae, United States, contends that the pleadings in this case set forth acts of "bombings" and "arson," (Br. 21) as predicate offenses, not even the Petitioners have made that claim prior to the entrance of United States into this case. Of course it does not bear repeating more than once that Migliorino has never in any way been implicated in those allegations. Nevertheless, the fact that a new type of predicate offense is set forth for the first time in the brief of Amicus Curiae is testimony to the all too obvious lack of substance in Petitioners' claim that RICO liability accrues to Respondents under the Hobbs Act.

We would submit that this Court should reaffirm the construction given, in *U.S. v. Enmons*, 410 U.S. 396 (1976), to the term "wrongful" as it is used in the Hobbs Act.

That Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear..." 18 U.S.C. § 1951(b)[2].

In *Enmons* this Court held that "wrongful" must apply not only to the means used by the defendant to perform the acts in question, but also to the objectives and goals sought to be advanced by the conduct.

The aggravated conduct of the defendants in *Enmons* eclipses any of the actions of Migliorino or the other Respondents in this case. In *Enmons*, the defendant union members and officials were charged with a series of acts of deliberate violence, including the firing of high-powered rifles and blowing up property owned by the employer, during the course of a labor dispute (*Id.* at 410 U.S. 398).

This Court held that, in contradistinction to situations where the Hobbs Act clearly applies, such as where union members use the threat of force to extort illegal "personal payoffs" from employers, rather, the use of illegal means in an

attempt to "achieve legitimate union objectives" was excluded from the Hobbs Act because the benefits that were the ostensible goal (ie. increased employment benefits) were not "wrongful" in and of themselves (*Id.* at 399-401).

This construction of "wrongful," which was derived from "the face of the statute," was said to have avoided the Government's "interpretation of the [Hobbs] Act [which] slights the wording of the statute that proscribes obtaining property only by the wrongful use of actual or threatened force, violence, or fear" (*Id.* at 399).

The overriding goal of the Respondents, the eradication of abortion in America, is an admittedly valid moral and social objective. As this Court recently observed: "Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of or condescension toward (or indeed any view at all concerning) women as a class..." (*Bray et al. v. Alexandria Women's Health Clinic et al.*, 506 U.S. ___, (slip op.), 113 S.Ct. 753 (1993).

Just as it was determined in *Bray* that the objective "aimed at" by abortion protestors was not the ill treatment of women, but rather the eradication of abortion, *(Id.)* so too, in this case, the objective of the Respondents, and of course Migliorino, is not to preempt the health clinic market, but rather, to stop abortion. It would matter little to the Respondents if the abortion clinics were to make the unlikely decision to give away abortions for free. Respondents would still have taken an activist role in trying to prevent them from occurring, because their goal is not to extract illegal economic benefits from the Petitioner-clinics, but to stop certain social conduct that they view to be morally intolerable.

Because Migliorino, and all the Respondents for that matter, had, as their undisputed goal, the eradication of abortion as a social phenomena, the mere alleged illegality of the means that they used toward that goal is not enough to constitute the

"wrongful" obtaining of property through actual or threatened use of force or fear under the Hobbs Act, as that term has been construed by this Court. Thus, the Petitioners have failed to show any conceivable set of predicate acts that support their RICO claims.

B. Considerations of Federalism in *Enmons* Make it Applicable to this Case.

In addition to the fact that *Enmons* is true to the text of the Hobbs Act, however, there is an further reason why its application to this case is particularly compelling. Here, as in *Enmons*, considerations of federalism dictate the nonapplication of "extortion" to the conduct of the Respondents.

As this Court noted elsewhere regarding the Hobbs Act:

> "Given this background-a statute...that if applied here would render a wide range of conduct violative of federal law, a legislative history that fails to evidence congressional awareness of the statute's claimed scope, and a subject matter that traditionally has been regulated by state law-we believe that a narrow interpretation of sec.1014 would be consistent with our usual approach to the construction of criminal statutes." (*Williams v. United States*, 458 U.S. 279, 290 (1982) citing *Enmons*, 410 U.S. at 411)(Also to the same effect regarding the federalization of state laws regarding securities is: *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462,479 (1977)).

Concerns regarding the potential for RICO to super-federalize whole areas of state law have previously been raised by the membership of this Court (*Sedima, S. P. R. L. v. IMREX CO.*, 473 U.S. 479,501 (1985)), (Marshall, J. dissenting, joined by Brennan, Blackmun, and Powell, JJ.: "...quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law of frauds...").

Language of this Court in *Turkette, Supra*, does not mitigate this point. There, it was stated that a more inclusive definition of "enterprise" under RICO, even if it resulted in a federalization of some state law crimes, was justified where Congress was aware that RICO might move areas of state law crimes into the federal realm. (*Id.* at 452 U.S. 586-587). However, the type of crimes were those that would be effected by "...the role of the Federal Government in the war against organized crime...[entailing] prosecutions involving acts of racketeering..." *(Id.* at 587). There is no evidence to suggest that Congress envisioned federalization of all state law regulating social protest activities.

If Petitioners' characterization of Respondents social protest conduct as Hobbs Act "extortion" is allowed, it will effectually federalize a whole body of state law regulating trespass, disorderly conduct, property damage, unlawful assembly, and tortious interferences of a wide variety.(See: Melly, *The Stretching of RICO : Pro-Life Demonstrators are Racketeers*? 56 U.M.K.C. L. Rev. 287, 309-12 (1988).

Though Amicus, The National Network of Abortion Funds, cites a "lack of remedies in state court" (Br. 26 n.26) (see also Br. Pet. 6, 7), quite the contrary, courts have been quick to apply state law causes-of-action.

Pro-life protestors who intentionally confine people within a clinic building can be liable for false imprisonment (*Roe v. Operation Rescue*, 710 F.Supp. 577 (E.D. Pa. 1989)); Causes of action for infliction of emotional distress have been allowed for the distribution of "wanted posters" of the plaintiff claiming that she was a murderer (*Van Duyn v. Smith*, 173 Ill. App. 3d 523, 123 Ill. Dec. 367, 527 N.E.2d 1005, 1012 (1988), *cert. denied*, 109 S.Ct. 3217 (1989)); claims for public nuisance have been successfully brought against pro-life activists (*National Organization for Women v. Terry*, 886 F.2d 1339, 1361-62 (2d Cir. 1989)). These remedies are, of course, in addition to state

criminal provisions relating to criminal property damage, assault and battery, theft, and trespass that might otherwise be available for activities at or relating to abortion clinics.

C. The Taking of the Human Remains was not "Wrongful"

We have previously argued why the ultimate objective of the taking and burial of the aborted babies was one of religious practice and moral compulsion. Yet because the Petitioners have contended that the Respondents (and of course Migliorino in particular) "...stole and exploited more than 4000 fetuses..." (Br. 6) left out for waste pickup, any implication that this taking constitutes "theft" so as to render the rule of *Enmons* inapplicable must be dispelled.

The retrieval of the aborted babies was from the loading dock area of a pathology lab, over which the Petitioners had no ownership or possessory interest whatsoever.

The remains were in storage drums with "other medical waste." J.A.58 (¶67). The Respondents were informed of the location of the remains by the pathology lab, and Migliorino and others were allowed to perform the retrieval in front of the employees of the lab who "did nothing to stop" them. J.A.58(¶66-67).

This taking of human remains destined for "disposal" by the pathology lab, J.A.57 (¶65), hardly constitutes theft in any sense, but particularly does not qualify as theft of anything over which the Petitioner-clinics had any property or other interest. Further, there is no reasonable expectation of privacy in "waste" or other garbage (using Petitioners' characterization of the human remains) left for collection in an area accessible to the public (*California v. Greenwood*, 486 U.S. 35 (1988); see also *Suburban Serv' n Sweep v. Swiss-Bernina, Inc.*, 91 F.R.D. 254, 260 (N.D.Ill. 1981), attorney-client privilege lost when papers

are retrieved from a trash dumpster in an office building parking lot).

There is no reason why the taking of the aborted babies should not be exempted from the definition of "extortion" along with the other alleged conduct of Migliorino under the rule of *Enmons*.

V. PETITIONERS HAVE FAILED TO ASSERT THAT ANY OF MIGLIORINO'S CONDUCT WAS DIRECTED AT AN ECONOMIC GOAL

Petitioners have attempted to set forth a semblance of allegations to the effect that all of the Respondents, except one, were economically motivated in their alleged wrongful conduct. Petitioners make such allegations against Respondents Scheidler (Br. Pet.46), Pro-Life Direct Action League (Pet.11), Scholberg (J.A.104), Murphy (*Id.*), Terry and Operation Rescue (Br. Pet.46). Except for those remaining Respondents who have no RICO liability in this matter, (Ryan and Wojnar) Migliorino is the sole Respondent against whom absolutely no facts are asserted upon which any colorable argument could be made that her actions were motivated by, or directed toward some economic goal.

Preliminarily, we would submit that the even the attempt by Petitioners to link the conduct of the other Respondents with a financial animus fails utterly. The Petitioners theory is that those Respondents, once they are part of the "inner circle" of the enterprise, "receive financial rewards far beyond what they were capable of earning in the world of legitimate business;" rewards that take the form of salaries and employment benefits (Br. Pet.46). Nevertheless, Petitioners concede that these financial benefits do not come to the Respondents from the Petitioners, or from any member of the purported class, or from any similarly situated abortion clinic. These "benefits" come from third party donors who contribute money to the Respondents work (Br. Pet. 47).

Even conceding, arguendo, the truth of Petitioners' dubious claim that the more "outrageous and highly-publicized the activities" are, the more likely the donors will be to contribute larger sums of money (*Id.*), such an assertion does not prove that these acts are economically directed or motivated.

Considerations of "proximate cause," if nothing else, should prevent the Petitioners from successfully contending that proof that the conduct of the Respondents was directed toward financial gain can be satisfied by evidence that they sought or received donations from contributors. "The link is too remote between..." the benefits donated to, and received by those Respondents and the conduct alleged against them (*Holmes, Supra*, 112 S.Ct. at 1319).

In this regard, Petitioners misconstrue the arguments made by Migliorino before the Seventh Circuit, by arguing that "defendant Migliorino conceded the economic nature" of such entities as the alleged enterprise in this case (Br. Pet.27, n.22) for purposes of satisfying the economic goal test. As was pointed out in the Response of Respondent Monica Migliorino (Miller) to Petition for Writ of Certiorari, pg.13, "Given the economic realities of almost all social and political action aimed at perceived social or moral evils (including abortion) almost all protest organizations have some economic component or cause some economic impact..." Thus, to hold that by reason of that, their activities must, ipso facto, thereby satisfy the economic motive test would render such test totally vacuous.

Regardless of the foregoing, Petitioners, who are after all masters of their own pleadings, have failed to even *attempt* a specific allegation linking the conduct of Migliorino to any economic goal. Even further, they appear to concede that she had no such motivation, as they affirmatively allege that Migliorino was a "volunteer" in PLAL-approved and PLAL-sponsored activities. J.A.104. Petitioners, in seeking RICO liability against this Respondent, whose conduct in opposing

abortion has never been described as other than purely directed toward social and political reform, ask this Court to embark on an unchartered course of RICO construction that drifts aimlessly away from the purposes of Congress; purposes which, according to one chief Senate sponsor of the act, viewed RICO as a major tool in eradicating the "baneful influence of organized crime in our *economic* life," (116 Cong. Rec. 25190 (1970) as cited in *Sedima,S.P.R.L.*, 473 U.S. at 488) (emphasis added).

VI. ADOPTION OF RESPONDENTS' THEORY OF RICO WILL RESULT IN NO EXTRAORDINARY LITIGATION PROBLEMS

A. The Test to be Applied is Objective in Nature

Petitioners inaccurately describe the economic test at the heart of this case as a subjective one (as supposedly involving the "weighing of subjective racial, religious...motivations," Br. 13; "[R]equiring a subjective inquiry ..." Br. 42).

However, although the Seventh Circuit decision uses the phrase "economic motive," the interpretive framework of the lower court ruling is clearly based on the objective test adopted by the Eighth Circuit, and that phrase is clearly interchangeable with the test which addresses the question of whether the *conduct* of a defendant in a RICO case, particularly where the predicate acts are alleged to constitute Hobbs Act extortion, was directed toward an *economic goal or purpose.*

As the Seventh Circuit noted, the Eighth Circuit had required that the RICO enterprise "be directed toward an economic goal." (*United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988)); (also: defining an enterprise as an association "which exists for the purpose of maintaining operations directed toward an economic goal..." *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

The Seventh Circuit adopted the *Anderson* definition of enterprise in *United States v. Neapolitan*, 791 F.2d 489, 500 (7th

Cir. 1986), and that adoption was utilized by the court below as a basis, in part, for the economic purpose test.

This test focuses, not on the subjective intent or state of mind of a RICO defendant, but rather, on the *conduct* in question, and whether, as an objective matter, that conduct is of such a nature as can be fairly described as having been directed toward the accomplishing of some financial goal or other economic purpose. While the subjective motive of the defendant may have some bearing on the conduct, particularly if the conduct is of an ambiguous nature, the primary inquiry is on the conduct itself, and the logical, natural, and direct object of its actions.

In fact, there is strong evidence that even the Petitioners recognize this. They concede that the economic requirement in the Eighth Circuit "seems to focus on objective 'goals,'" (Br. 39 n.30). Petitioners further concede that in the analogous field of antitrust law, "'purpose' describes the defendant's [objective] goal or end result..." (Br.43 n.35)(citations omitted). Thus, any inquiry into the economic purposes or goals of a defendant's conduct is intrinsically objective in nature.

B. The Objective Test will Create no Undue Litigation Hardships

Petitioners bemoan, with a litany of litigation horribles, the near-cataclysmic "nightmare" that will result from the adoption of an economic test in RICO cases.("the Pandora's box of economic motive..." Br.14; economic motive requirement "demands a subjective and dangerous inquiry..." Br. 38; "...months-long excursions into the workings of the human mind..." Br.42, are predicted, where the inner motives of defendants will 'politicize' and 'inflame' the case." Br.40).

Despite Petitioners desolate and barren landscape of scorched-earth and endless litigation, the fact is that the test applied by the Seventh and Eighth Circuits (and the Second Circuit for

that matter in *United States v. Bagaric*, 706 F.2d 42 (2d Cir.) *cert. denied*, 464 U.S. 840 (1983) is objectively concentrated on the nature of the defendant's conduct and its goals, and has nothing to do with inner motives, or psychiatric testimony, or anything of the sort. When thus reduced to the real legal issue involved here, the only thing left of Petitioners "litigation nightmare" argument is their hyperbole.

Amicus, United States, makes a similar argument, though somewhat more finely honed. They argue that the requirement that RICO conduct must have "some financial purpose" is an "amorphous requirement [that] is incapable of principled administration by the courts or the government" (Br.20-21), apparently because "the court of appeals' analysis leaves it entirely unclear how much economic benefit would be enough to convert 'political' or 'religious' conduct falling outside RICO into 'economic' conduct falling within the statute's reach." Br.20-21.

Amicus confuse an objective inquiry, of *kind*, into the nature of the conduct (ie. whether the goal of the actions of the defendants is basically economic) with an inquiry of *degree* (ie. whether there is enough economic motive). The former inquiry was adopted by the lower court, and is urged by this Respondent. The later inquiry was not adopted by the Seventh or Eighth circuits, nor is it argued by this Respondent.

There is no reason that the test proposed in this case would be any more unworkable than similar tests used by this Court in similar cases. There is no evidence that the requirement under *Enmons*, *Supra*, that conduct be directed toward "objectives" which are "wrongful" in themselves to be culpable as extortion under the Hobbs Act, is unduly burdensome. Likewise, in the antitrust field, the exemption of conduct that is not "aimed or directed at" the kind of evil which the Sherman Act prohibited, in *Apex Hosiery Co., Supra*, has not created a "litigation

nightmare." Petitioners fears are totally unfounded in this regard.

VII. MIGLIORINO HAS NO RICO CONSPIRACY LIABILITY

In Count IV of the Complaint, Petitioners assert liability against several defendants on a RICO conspiracy theory under § 1962(d). Petitioners assert that claim against "the RICO Defendants." J.A.74, ¶111. "RICO Defendants" are defined by the Petitioners in ¶94 of the Complaint. J.A.65. The list of "RICO Defendants" *excludes* Migliorino. This was clearly intentional as Petitioners, elsewhere in the Complaint, refer to "the RICO Defendants and Defendant Migliorino." Complaint ¶106. J.A.72.

Thus, although Migliorino is referred to in Count IV as a person who "agreed with [the other named defendants]...to conduct and/or participate in the affairs of PLAN," Complaint ¶113, J.A.74, the RICO conspiracy claim does not name her as a defendant, and therefore that claim is not made against her.

Even if Migliorino were a named defendant in the count IV claim, however, the Petitioners have failed to assert a valid conspiracy claim against her.

A "conspiracy is a partnership in criminal purposes," *United States v. Kissel*, 218 U.S. 601, 608 (1910). The parties to a conspiracy enjoy cooperative relationships, as in business, which will facilitate the achievement of the goal of the conspiracy. *Direct Sales Co. v. United States*, 319 U.S. 703, 709 (1943); *United States v. Falcone*, 311 U.S. 205 (1940).

The Seventh Circuit has held that in RICO litigation it is necessary that the Plaintiffs set forth the factual basis for any claim of conspiracy. Conclusory allegations are not sufficient. *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344, 351 (7th Cir. 1992). This rule has been followed uniformly by all eight circuits that have considered the question. (Migliorino

adopts the argument, discussion, and citation of authority on this point contained in the Brief of Respondent Murphy, n.12 and accompanying text.

Petitioner's Complaint, however, fails to detail (and the RICO Case Statement fails to show any evidence for) Migliorino's involvement in any conspiracy to commit predicate acts of extortion that would engage the provisions of RICO. At best, Petitioners have made only the vaguest references to Migliorino's having been "associated with PLAL," J.A.104, and having participated as a speaker at a PLAN convention. J.A.54.

It is clear that Petitioners have stretched, beyond reason, the concept of "conspiracy," in a RICO context, not only by their failure to factually detail Migliorino's participation in any alleged agreement to commit RICO extortion, but by laying at the doorstep of the Respondents random events which are not even part of this record. Petitioners' reference to the tragic death of a physician in Florida (Br. Pet.5) is not only an unsubtantiated irrelevancy in this action, but it is a grossly unfair implication against Migliorino, whose opposition to abortion does not condone nor does it perpetrate acts of violence.

Because "conspiracy law is directed only at those who have intentionally agreed to further the illegal object" of the conspiracy (*United States v. Spock*, 416 F.2d 165, 172-173 (lst Cir. 1969)), and because the Petitioners have not only failed to specify what illegal predicate acts Migliorino agreed, in concert with the other Respondents, to commit, but they have implied her participation purely by reason of her protected First Amendment activities (speaking and associating), they have failed to assert any valid RICO conspiracy claim against her.

CONCLUSION

This Court should affirm the Court of Appeals judgment, dismissing the Complaint of the Petitioners.

Respectfully Submitted,

Of Counsel:

John W. Whitehead
Alexis I. Crow
The Rutherford Institute
1445 East Rio Road
Charlottesville, VA 22901
(804) 978-3888

Craig L. Parshall
Counsel of Record
The Rutherford Institute
910 Princess Anne St.
Law Building/Suite 105
Fredericksburg, VA 22401
(703) 371-4140

Dated: September 29, 1993

APPENDIX

Excerpts from the Answer of Defendant Monica Migliorino (Miller) to the Second Amended Class Action Complaint.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members who use or may use the services of women's health centers that provide abortions, DELAWARE WOMEN'S HEALTH ORGANIZATION, INC., and LADIES CENTER OF PENSACOLA, INC., on behalf of themselves and all other similarly-situated clinics.

Plaintiffs,

v.

JOSEPH M. SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE ACTION LEAGUE INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE, AND OPERATION RESCUE

Defendants.

Civil Action No. 86 C 7888

ANSWER OF DEFENDANT MONICA MIGLIORINO (MILLER) TO THE SECOND AMENDED CLASS ACTION COMPLAINT

Now comes the above defendant Monica Migliorino (Miller) hereinafter referred to as defendant by her attorneys, Craig L. Parshall and local counsel Edward R. Grant, as and for an Answer and Affirmative Defenses to the Plaintiffs' Second Amended Class Action Complaint (hereinafter referred to as complaint) admits, denies, and alleges as follows:

37. ANSWER: Defendant denies having participated in any theft and vehemently denies that any laboratory specimens with which she has ever had contact are stolen laboratory specimens, and affirmatively alleges that defendant Vital-Med routinely abandons to public disposal laboratory specimens consisting of, among other things, the dismembered bodies and remains of aborted unborn children. Defendant further denies any action designed to intimidate and harass clinics by focusing attention on the stolen specimens in at least six states and further alleges that any handling of last rites and burial of aborted unborn babies by defendant was for the purpose of granting such aborted infants the right to a humane and respectful funeral. That such last rites and burials were an act of religious charity, protected under the First Amendment of the United States Constitution and applicable state constitutional provisions and were an act of religious worship and faith. Admit that defendant has exercised her constitutional right to travel across state lines for various and sundry purposes, but specifically denies that this defendant has travelled across state lines for the purpose of accomplishing any theft whatsoever. Defendant does not possess information sufficient to form a belief as the meaning of the phrase "local actions" in paragraph 37 and therefore denies the same. This defendant further denies information sufficient to form a belief as to whether any actions of this defendant resulted in a cancellation of any contract between defendant Vital-Med and any of the plaintiff clinics, and further affirmatively alleges that if any such cancellation occurred it was the result of a voluntary and informed decision of defendant Vital-Med and not by reason of any acts of the defendant. Defendant further denies information sufficient to form a belief as to those allegations of paragraph 37 that relate only to defendant Murphy, or defendant Scheidler.

67. ANSWER: Admit that this defendant made several trips to a premises near, adjacent to, or part of Vital-Med, deny information sufficient to form a belief as to whether the property

was the property of Vital-Med or some other person, agency, or entity, specifically deny that this defendant entered any laboratory building by any means whatsoever, admits that this defendant in an area of a loading dock where the fetal remains of unborn children killed during abortion had been abandoned to disposal retrieved such fetal remains of such unborn children so that the same could be given a decent, humane, and respectful funeral and burial; as to the balance of the allegations and averments of said paragraph this defendant lacks information sufficient to form a belief as to the truth of such allegations. That this defendant specifically denies that any of the actions of this defendant or any other defendant constituted a theft.

75. ANSWER Answering paragraph 75, insofar as the allegations relate to this defendant, she denies any implied, actual, or obvious threat to women who have used, or might in the future consider using the said clinics, and specifically deny any actual implied or obvious threat on the part of this defendant that the privacy of women would be invaded and the confidentiality would be breached by having her name, or personal, or medical information revealed publicly, and affirmatively allege that this defendant took steps to ensure that confidential, personal, or medical information of any woman was not revealed publicly and specifically denies that she ever threatened to reveal such information publicly and, as to the balance of the allegation contained in paragraph 75 deny information sufficient to form a belief as to the truth of the matters contained therein.

77. ANSWER In answering the allegations in paragraph 77 this defendant specifically denies each of the allegations contained therein but affirmatively alleges that this defendant did send letters directly to the landlord and/or prospective landlord of Summit transmitting truthful information and honest advice, done in good faith and in the same fashion as other constitutionally protected political activity protected under the

First Amendment such as boycotts and other economic advocacy efforts.

AFFIRMATIVE DEFENSES TO COUNT I

Defendant Monica Migliorino (Miller) believes that at, and from the very moment of human conception a distinct, separate, unique and precious human life exists, possessed of an eternal soul and created in the image of God. Defendant believes that abortion, by any means constitutes the greatest of injustices because it is aimed at the unborn, it treats them in their defenseless and forsaken state, as if they did not exist, and that they are non-members of the human race.

Insofar as defendant Monica Migliorino (Miller) participated in the handling, funeral rites, and burial of the unborn victims of abortion, she did so motivated by her religious belief and in the context of religious worship, believing that such funeral rites and burials were an act of charity and a work of mercy, affording such unborn victims a measure of recognition of individual worth and human dignity.

In so far as defendant Monica Migliorino (Miller) has advocated against, and opposed abortion, she has done so because she has been motivated to do so by her religious belief in the sanctity of human life, she is commanded to love her neighbor, and she believes herself to be under the spiritual and moral compulsion to rescue those innocent ones who are being delivered up to an outrageous and cruel death.

(23)

Supreme Court, U.S.
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No. 92-780

In The

Supreme Court of the United States

October Term, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., DELAWARE WOMEN'S HEALTH ORGANIZATION, INC., AND SUMMIT WOMEN'S HEALTH ORGANIZATION, INC.,

Petitioners,

v.

JOSEPH M. SCHEIDLER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT TIMOTHY MURPHY

PAUL BENJAMIN LINTON
Americans United for Life
343 S. Dearborn St. #1804
Chicago, Illinois 60604
(312) 786-9494

Counsel for Respondent

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Second Amended RICO Complaint, alleging extortion against protesters, properly dismissed, where the designated "enterprise" and the alleged "racketeering activity" had a political or social, but not a commercial, dimension?

2. Was the Complaint properly dismissed after nearly five years of litigation and discovery, where the Complaint and the RICO Case Statement showed that a RICO claim or conspiracy had not been specifically alleged?

3. Was the Complaint properly dismissed where Petitioners lacked standing to pursue their RICO claims against Respondents and failed to allege Hobbs Act extortion or any other predicate acts under RICO?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fed. R. Civ. P. 12(b), in pertinent part, provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.

Other statutory provisions are reproduced in Petitioners' Brief (Pet. Br. at 1-3).

STATEMENT OF THE CASE[1]

In June, 1986, Petitioners filed a one-count Complaint under the federal antitrust laws (15 U.S.C. §§1, 26) in the District of Delaware against certain Respondents and other Defendants (No. 86 C 263).[2] The suit was voluntarily dismissed. Petitioners refiled their Complaint in the

[1] Respondent generally adopts the Statement of the Case of Respondents Scheidler, *et al.*, in their Brief.

[2] Plaintiffs originally consisted of the National Organization for Women, the Delaware Women's Health Organization

Northern District of Illinois on October 17, 1986, seeking nationwide declaratory and injunctive relief (No. 86 C 7888). For almost five years, Petitioners pursued extensive discovery, reviewing hundreds of tapes, files and letters of the Respondents and many others. More than a dozen depositions were taken before Petitioners filed their RICO Case Statement in March, 1991 (R.469).

Petitioners filed their First Amended Complaint on February 2, 1989, which added alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1962, and prayers for treble damages (R.155). The First Amended Complaint also added new defendants, including Respondent herein, Randall Terry, Andrew Scholberg, and Vital-Med Laboratories, new conspiracies, and three new pendent state theories of recovery. The conspiracy allegations were so broadly drawn that Petitioners later claimed in their RICO Case Statement that they embraced hundreds or even thousands of co-conspirators (¶3; J.A. 89).

Petitioners filed their Second Amended Complaint on September 22, 1989 ("Complaint") (R.236). Petitioners

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("DWHO"), and the Ladies Center of Pensacola. The Ladies Center was dismissed from the case. Petitioner Summit Women's Health Organization ("SWHO") was added in the first amended complaint. For purposes of brevity, Respondent refers to the Plaintiffs as the Petitioners throughout this Brief.

Joseph M. Scheidler and the Pro-Life Action League, Inc. were among the original defendants. Respondent Murphy and Andrew Scholberg were added as defendants in the first amended complaint. For purposes of brevity, throughout this brief "Respondent" refers to Timothy Murphy, unless otherwise specifically indicated.

alleged that Respondents conspired to "drive every clinic in the United States . . . out of business" (¶26) and that they had allegedly engaged in "unlawful, concerted action, including repeated acts of trespass, extortion and vandalism directed at women's health centers. . . . " (¶27) They also alleged that Respondent, other Defendants, and one or more employees of Defendant Vital-Med, "conspired to steal fetal remains located in Vital-Med's research laboratory in Northbrook, Illinois," stole some 4,000 specimens over a period of 10 months, and conspired to "use the specimens as part of their drive to disrupt the operations of health clinics generally" in a media campaign. (¶¶64-73) Among the uses alleged were "actions designed to intimidate and harass clinics by focusing attention on the stolen specimens," including "highly publicized" funeral masses and burials. (¶¶37, 64-78) Petitioners alleged that the purpose of Respondents' actions was "to force all clinics that perform abortions out of business and to eliminate the choice of abortion for women who are pregnant." (¶85) Petitioners asked for broad declaratory relief "that the actions of" Respondents "have violated the rights of" the clinics and their patients to be free of restraints of trade and for equally broad injunctive relief to prohibit Respondents from allegedly "carrying out a concerted effort to drive women's health centers . . . out of business" and from "using unlawful means to drive women's health centers . . . out of business." (¶¶79-93)

Count II, a RICO §1962(a) claim, was brought only by the abortion clinics – Delaware Women's Health Organization, Inc., and Summit Women's Health Organization – as class actions (no class was ever certified). Petitioners

alleged that Respondents formed enterprises "with common purposes, including driving all clinics that provide abortion services out of business." (¶¶95-96) The sole RICO predicate act alleged was Hobbs Act extortion (18 U.S.C. §1951). In each instance, Petitioners alleged only that clinic employees, physicians, and patients had "to give up" their jobs, their medical practice or their constitutional rights. (¶¶97-98) Petitioners never alleged that any Defendant, or co-conspirator linked to Respondents, obtained, or attempted to obtain, any property from any clinic, doctor, or patient.

Counts III and IV were RICO §1962(c) and (d) claims. Petitioners alleged that Respondents and other Defendants were associated with one of the enterprises, Pro-Life Action Network (PLAN), and "participated in PLAN's affairs through a pattern of racketeering activity" (¶109), namely, the Hobbs Act extortion alleged in ¶¶97-98. Petitioners alleged that Respondents engaged in a conspiracy to "use the income they received from a pattern of racketeering activity . . . to establish or operate PLAN" and "agreed to the commission of the extortionate acts from which the above-mentioned income would derive" (¶¶112-113). The remaining counts alleged pendent state causes of action.

On August 29, 1990, Respondents filed a Motion to Dismiss the Second Amended Complaint under Fed. Rules of Civ. Pro. ("FRCP") 12(b)(6) or, in the alternative, for a more definite statement under FRCP 12(e) (R.335). Respondents also made a motion to require Petitioners to file a RICO Case Statement under FRCP 16 (R.360).

On February 4, 1991, the District Court, "to establish a[n] efficient procedure [to] process" the RICO claim, ordered Petitioners to file a RICO Case Statement. The Court ordered Petitioners to "include the facts the plaintiffs [were] relying upon to initiate each RICO claim as a result of the 'reasonable inquiry' required by Fed. R. Civ. P. 11" (introductory ¶; J.A. 81-82; R.430). "In particular. . . . [the] statement . . . [had to] state in detail and with specificity" answers to twenty questions. (*Id.*)

On March 18, 1991, Petitioners filed their RICO Case Statement. It included 29 pages of text and two appendices of 41 and 36 pages, respectively. The RICO Case Statement cited and relied on discovery depositions (¶5(d); J.A. 92-93), discovery documents (¶6(2) n.5; J.A. 103), and trial testimony from other proceedings (¶6(3); J.A. 105).

While the Complaint itself alleged sporadic acts of trespass, vandalism, assault, battery, and theft by Respondents, other Defendants, or unnamed co-conspirators (¶¶2, 27, 40, 42, 46-50, 55, 60, 61, 64, 67, 74, 97-98), it never even mentioned "bombing" or "arson" by any Respondent, other Defendants, or their "co-conspirators." The RICO Case Statement, for the first time, referred to "bombing" or "arson" but only as part of "the pattern of extortionate acts." (¶2; J.A. 88) However, Petitioners did not "list the specific [federal or state extortion, bombing, or arson] statutes which were allegedly violated," as required by the Order of February 4, 1991.[3] Instead, Petitioners characterized these acts only as "violat[ions] of

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[3] Under federal law, "bombing" or "arson" are not "racketeering activity" under 18 U.S.C. §1961. "Arson" in violation of

the Hobbs Act, 18 U.S.C. §1951." (¶¶5(a), (p), J.A. 91, 95-97)[4] Neither the Complaint nor the RICO Case Statement alleges facts to indicate "in detail and with specificity" what the plaintiffs "reli[ed] upon to initiate" their "RICO claim" or alleges individual conduct by any Respondent involving acts of "bombing" or "arson" – or their agreement to such acts as part of a conspiracy – as required by the Order of February 4, 1991.

Two months later, on May 28, 1991, the District Court, expressly relying on the allegations set out in the RICO Case Statement, granted Respondents' Motion to Dismiss, holding that Petitioners failed to state a claim under either the antitrust laws or RICO. The Court then dismissed the case in its entirety. 765 F. Supp. 937, 941. While Petitioners described their investigation as "continu[ing]" and "incomplete" (¶2 n.1; J.A. 88) in the RICO Case Statement and offered "to satisfy any request . . . [for] additional information" (¶20; J.A. 116), they did not seek to open the judgment under FRCP 59(e) or FRCP 60, or request a continuance under FRCP 56(f) to conduct additional discovery by taking depositions, specifying the evidence that might be obtained and how it would demonstrate that a genuine issue of fact existed. Instead, Petitioners immediately appealed the dismissal to the Court of Appeals.

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state law is a "racketeering activity." *Id.* "Bombing" is not a predicate state offense under "racketeering activity." *Id.*

[4] The Government's suggestion that Petitioners pled "arson" or "bombing" as independent predicate acts (Gov. Br. 3, 21-22), therefore, misreads the District Court's Order of February 4, 1991, and the RICO Case Statement.

The Court of Appeals unanimously affirmed. 968 F.2d 612. Petitioners filed a petition for rehearing, which was denied on August 4, 1992. (Pet. App. G-2) Petitioners filed a petition for certiorari on November 2, 1992. On June 14, 1993, this Court granted certiorari limited to Question 1 (the RICO question). 113 S.Ct. 2958 (1993).

SUMMARY OF THE ARGUMENT

For the reasons set forth in the Briefs of Respondents Scheidler *et al.*, and Terry *et al.*, Petitioners' RICO complaint was properly dismissed under common standards of civil procedure. Petitioners failed to allege that Respondents had any motive of commercial gain, an essential element of a RICO claim under the *Ivic-Bagaric* rule. Moreover, Petitioners failed to plead any Hobbs Act extortion because they never alleged that Respondents "obtained" or "attempted to obtain" any property from Petitioners. *United States v. Evans*, 112 S.Ct. 1881 (1992).

In addition, dismissal was justified under heightened pleading standards because of the impact on First Amendment freedoms. Petitioners' essential claim is that social protest – of any kind – against abortion clinics constitutes "extortion" under RICO. That claim clearly impinges upon First Amendment freedoms (*NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982)), and was therefore subject to heightened pleading requirements (*Franchise Realty v. S.F. Loc. Joint Exec. Bd.*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977)). Because Petitioners' failed to satisfy such standards, their complaint was properly dismissed.

In dismissing Petitioners' complaint, the District Court was also justified in requesting and relying upon Petitioners' RICO Case Statement. RICO Case Statements are appropriate tools of judicial administration under FRCP 11, FRCP 12(e), FRCP 16, and FRCP 56 to manage RICO cases and to prevent nonmeritorious claims from proceeding to trial. Many circuit courts have expressly approved the use of RICO Case Statements, and federal courts in virtually all circuits use them.

Finally, the District Court in this case was justified in disposing of this case under FRCP 56, and affirmance on that ground, in the alternative, is justified. When Petitioners submitted their RICO Case Statement, they cited and relied upon discovery and deposition materials outside the pleadings. As a result, the District Court could have converted Respondents' Motion to Dismiss into a motion for summary judgment under FRCP 56 and dismissed the complaint with prejudice.

ARGUMENT

I. THIS RICO ACTION WAS PROPERLY DISMISSED UNDER FRCP 12(b)(6) OR FRCP 56 AFTER NEARLY FIVE YEARS OF LITIGATION AND DISCOVERY BECAUSE PETITIONERS FAILED TO PLEAD ANY RICO VIOLATION WITH THE PRECISION REQUIRED WHEN A RICO CLAIM IMPINGES UPON A BROAD RANGE OF POLITICAL OR SOCIAL ACTIVITIES PROTECTED BY THE FIRST AMENDMENT.

Petitioners' failure to plead a commercial dimension to Respondents' conduct allegedly in violation of RICO

was sufficient to warrant dismissal of their claim for relief with prejudice.[5] However, dismissal was also warranted on additional grounds.[6] Petitioners also failed to distinguish with precision in their Complaint or their RICO Case Statement that aspect of Respondents' conduct which was *unprotected* under the First Amendment, and *illegal* under RICO. On the face of the complaint, some aspects of Respondents' conduct were manifestly protected under the First Amendment. Petitioners had to distinguish those aspects from Respondents' unprotected conduct that constituted extortion under the Hobbs Act (18 U.S.C. §1951) or, through actions of alleged co-conspirators, that constituted other "racketeering activity"

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[5] For purposes of brevity, Respondent adopts the arguments of Respondents Terry *et al.*, that extortion under the Hobbs Act (18 U.S.C. §1951) was not pled in the Complaint or in the RICO Case Statement by Petitioners, since Respondents did not "obtain the property" of Petitioners. Similarly, Respondent adopts the arguments of Respondents Terry *et al.*, on the issue of Article III and RICO standing, the arguments of Respondent Migliorino on the First Amendment, and the arguments of Respondents Scheidler *et al.*, on the absence of any commercial dimension.

[6] Respondents "may rely upon any matter appearing in the record in support of the judgment below," *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982), "whether or not the ground was relied upon or even considered by the trial court," *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970), or even if their "argument[s] may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *Id.* Indeed, " '[i]n the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.' " *Brown v. Allen*, 344 U.S. 443, 459 (1953) (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937)).

under RICO.[7] The failure to make this crucial distinction was fatal to their claim for relief. Accordingly, Petitioners' claim for relief was properly dismissed with prejudice.

A. A Heightened Specificity in Pleading Was Required Where First Amendment Rights of Speech and Association were Impacted.

In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), a local chapter of the NAACP organized a boycott of white merchants and enforced the boycott by several means, including a number of acts of violence directed primarily at blacks not honoring the boycott, such as the firing of gunshots into their homes (on at least three occasions), slashing of tires, throwing a brick through a windshield of a car, stealing whiskey purchased from a white merchant, and placing threatening phone calls. 458 U.S. at 902-06. This Court unanimously dismissed overbroad conspiracy judgments against civil rights boycotters and demonstrators. This Court held:

> Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that

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[7] The Government recognizes that Petitioners did not allege more than "extortion" in their Complaint; it seeks to use the RICO Case Statements to fill in that defect (Gov. Br. 3, 21). The defect, however, is not remedied if Respondents are not tied to the new statements of fact, as they are not.

> the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims. "In this sensitive field, the state may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' "

Id. at 920 (citations omitted). The First Amendment, the Court stated, requires "precision of regulation." *Id.* at 921.

> A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts.

Id. at 933. Here, no such allegations – characterized by "precision" – of a RICO violation by Respondents, or conspiracies to do so by Respondents, or anyone else with whom they might be concretely linked, are contained in the Complaint or in the statement of allegations that had to be in the RICO Case Statement under the District Court's Order of February 4, 1991. Nor is the relief sought narrowly tailored. This litigation was, therefore, rightly terminated with prejudice.

First Amendment expression permeates the activities of Respondents. Petitioners attempt to portray Respondents as forming one monolithic entity, engaged in one common activity ("trespass, extortion, and vandalism"); the truth is that Respondents have used many different methods and widely diverse styles to communicate to the public, opinion makers, and law makers their opposition to the abortion policy of this country.

The centerpiece of the Complaint is Respondent Scheidler's manual on protest activities, *Closed: 99 Ways to Stop Abortion* (1985). (¶¶28-29, 77; R.109) Contrary to the central teaching of this Court about the First Amendment, this litigation is, in many ways, about suppressing that book and the ideas that it embodies. The protected First Amendment activities alleged in the Complaint, many of which are described in the book, include sidewalk counseling, picketing, press conferences, leafletting, demonstrations and counter-demonstrations, "blitzes," rallies, marches, advertising, burials of dead unborn children and religious services, blockades, and sit-ins. (¶¶2, 11, 35, 38, 40, 48-50, 55-56, 59-60, 73, 98(j), 125) Many of these activities are clearly within the ambit of the protection of the First Amendment.[8]

The Court of Appeals' comment that "the complaint does not attempt to bar all anti-abortion activities" ignored the sweep of the Complaint on its face and in its

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[8] *See, e.g., DeBartolo v. Florida Gulf Coast Bldg. & Const.*, 485 U.S. 568, 575-76 (1988) (union's hand-billing against businesses in shopping mall); *City of Houston, Texas v. Hill*, 482 U.S. 451, 461 (1987) (verbal challenges to activities of another); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (leafletting against discriminatory real estate practices); *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) (gathering to march, sing, and chant); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (same); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (proselytizing in public places); *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) (distribution of literature). Legislation that would attempt to regulate such activities would have to be "narrowly tailored" as to time, place and manner. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Petitioners' Complaint and RICO Case Statement must be measured against similar exacting standards, if the values behind the First Amendment are to be vindicated.

prayers for relief. 968 F.2d at 616. It also ignored entirely Petitioners' RICO Case Statement. Indeed, the Complaint and the RICO Case Statement are directed indiscriminately at the Respondents' "actions"; they are thus unconstitutionally overbroad, an overbreadth that cannot be squared with the sensitivity of analysis demanded by the First Amendment.

Respondent does not contend that "violence, criminal trespass, and vandalism are protected by the First Amendment." *Id.* at 621. They are not. Nevertheless, the Complaint, when read in light of the facts (or lack of facts) set out in the RICO Case Statement, was properly dismissed because Petitioners failed to make any distinction between legal or illegal activity, when they sought injunctive relief indiscriminately aimed at preventing Respondents *"from carrying out a concerted effort* to drive women's health centers . . . out of business." ¶93 (emphasis supplied). As this Court pointed out in *Claiborne Hardware*, "the term 'concerted action' encompasses unlawful conspiracies and constitutionally protected assemblies." 458 U.S. at 888. *See also*, Complaint ¶¶1, 26, 41. Similarly, Respondents were indiscriminately alleged to have committed "extortion" merely because their activity may have dissuaded women from having abortions, deterred women from soliciting abortion clinics, or induced personnel to stop performing abortions. (¶98(d)) Petitioners' Complaint, therefore, inappropriately seeks to make criminal the natural consequences of activity protected by the First Amendment, that is, that access to abortions is curtailed by the picketing or leafletting itself, even though such curtailed access stems from a change in policy or the persuasion

affected by such protected activity. The adoption by this Court of Petitioners' argument would be a radical change in First Amendment theory.

The allegations of damage, and the declaratory relief sought, were also broadly and indiscriminately aimed at suppressing "the actions" of the Respondents. (¶¶83-93) These "actions" were deemed illegal because they allegedly invoked "fear" or "intimidation" among patients or clinic personnel. (¶97) But this Court is justifiably wary of allowing speech to be censored on the basis of the perceived reaction of its audience. *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949); *Cohen v. California*, 403 U.S. 15, 21-22 (1971). The RICO allegations, in the Complaint and as amplified by the RICO Case Statement, similarly diffusely referenced Respondents' "activities." (¶105) Likewise, one of the pendent state claims was vaguely directed at "the unlawful acts described above." (¶117) Petitioners assert that the objective of driving abortion clinics out of business is per se illegal. (¶93) The use of protest to influence merchants and their business is, however, squarely protected by the First Amendment.[9] Petitioners charged that Respondents created an "intimidating" climate outside of abortion clinics. (¶¶56, 91, 97-98) Nevertheless, to the degree that such atmosphere around the clinics was caused by picketing and

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[9] *DeBartolo v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 576 (1988) (union handbilling against businesses in shopping mall); *NAACP v. Claiborne Hardware*, 458 U.S. at 910 (boycott of merchants); *Thornhill v. Alabama*, 310 U.S. 88, 99 (1940) (picketing intended "to induce the customers not to patronize the employer.").

handbilling, such conduct is squarely protected by the First Amendment.[10] "[S]peech does not lose its protected character simply because it may embarrass others or coerce them into action."[11]

The allegations of conspiracy touching on First Amendment speech and association for political and social purposes also require heightened pleading. Petitioners charged that Respondents were part of a "conspiracy" to shut down abortion businesses. But the claim is based on conclusory allegations against Respondents, unsupported by facts, despite the District Court's Order of February 4, 1991, requiring the filing of a RICO Case

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[10] *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *Cox v. Louisiana*, 379 U.S. 536, 552 (1965).

[11] *Claiborne Hardware*, 458 U.S. at 910. *See also, id.* at 921 ("[t]o the extent that the lower court's judgment rests on the ground that 'many' black citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and traduction,' it is flatly inconsistent with the First Amendment"); *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("[t]he claim that the expressions were intended to exercise a coercive impact on respondent [a realtor] does not remove them from the reach of the First Amendment."); *Watts v. United States*, 394 U.S. 705, 708 (1969) ("[t]he language of the political area . . . is often vituperative, abusive, and inexact"); *Cox v. Louisiana*, 379 U.S. 536, 551-52 (1965) (" 'a function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger' ") (citations omitted); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("profound national commitment to the principal that debate on public issues should be uninhibited, robust and wide open").

Statement. A charge of conspiracy, especially in complex RICO litigation, properly requires a factual basis. The decisions uniformly provide that conclusory allegations of conspiracy do not state a claim for relief.[12]

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[12] *See, e.g., Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344, 352 (7th Cir. 1992) (RICO) (complaint is deficient where conspiracy facts are not pled); *Tel-Phonic Services, Inc. v. TBS International, Inc.*, 975 F.2d 1134, 1140 (5th Cir. 1992) (RICO) (the conspiracy allegations were deficient; "the complaint [did] not allege facts implying any agreement"); *Glessner v. Kenny*, 952 F.2d 702, 714 (3d Cir. 1991) (RICO) (the "complaint alleges no facts to support an allegation of agreement and knowledge"; the conspiracy count is deficient); *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 48 (1st Cir. 1991) (RICO) (the conspiracy claim is deficient; it was "perfunctory" "alleged in wholly conclusory terms"; it failed to "provide any specifics as to the details of the alleged conspiracy"); *Danielsen v. Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1220, 1232 (D.C. Cir. 1991) (RICO) (failure to allege elements of conspiracy and facts supporting allegations rendered complaint deficient); *Craighead v. E.F. Hutton & Co. Inc.*, 899 F.2d 485, 495 (6th Cir. 1990) (RICO) (complaint deficient; plaintiffs only pled the "conclusory allegation that the defendants 'conspired' "); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990) (RICO) (conspiracy claim is deficient; "it does not allege facts implying agreement"); *O'Malley v. O'Neill*, 887 F.2d 1557, 1560 (11th Cir. 1989) (RICO) ("[t]he plaintiffs' complaint and RICO Case Statement allege at most that some of the defendants knew about O'Neill's activities; there are no facts alleged that would indicate that they were willing participants in a conspiracy"), *cert. denied*, 496 U.S. 926 (1990); *Weiszmann v. Kirkland & Ellis*, 732 F. Supp. 1540, 1546 (D. Colo. 1990) (RICO) ("a plaintiff must . . . provide some factual basis for a claim that a defendant conspired with another"); *First National Bank of Louisville v. Lustig*, 727 F. Supp. 276, 282 (E.D. La. 1989) (RICO) ("the complaint and RICO Case Statement contain no allegations that First Financial agreed, with co-conspirators or with anyone else, to the commission of two predicate acts").

"[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1968). Even if Petitioners could charge that a particular alleged co-conspirator had engaged in RICO cognizable conduct, "the right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *Claiborne Hardware*, 458 U.S. at 908, 925 n.68.[13] Barefaced and undifferentiated assertions of conspiracy, unaccompanied by the flesh and bone of fact, cannot be squared with the "precision of regulation" required by *Claiborne Hardware*. Here the District Court properly exercised its "power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."[14] Petitioners did not meet this standard in their Complaint. They could not meet the standard in the statement of facts required to be filed in their RICO Case Statement, despite years of far-reaching and highly intrusive discovery. Accordingly, the

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[13] Petitioners abuse the "chameleon-like" character of conspiracy law that Justice Jackson so ably criticized in *Krulewitch v. United States*, 336 U.S. 440, 447-49 (1949), and they should not be allowed to persist in their indiscriminate labeling of Respondents when the Complaint and the RICO Case Statement squarely touch First Amendment activity.

[14] *Associated General Contractors of Cal v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983) (antitrust).

District Court rightly terminated this litigation on the merits.

Because the Complaint and the RICO Case Statement touch clear First Amendment activity, the allegations and assertions of fact in them must be tested by a heightened requirement of precision – a burden that Petitioners did not and could not sustain. Courts in nearly all circuits have adopted the rule of *Franchise Realty v. S.F. Loc. Joint Exec. Bd.*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977):

> [I]n any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.

Id. at 1082-83.[15] This Court "has consistently recognized the sensitivity of First Amendment guarantees to the

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[15] Courts in all but two circuits (the Fourth and the Eleventh) have adopted the *Franchise Realty* standard. *D.C.: Federal Prescription Service, Inc. v. Amer. Pharm. Assoc.*, 471 F. Supp. 126, 129 (D. D.C. 1979); *First: Cash Energy, Inc. v. Weimer*, 768 F. Supp. 892, 899 (D. Mass. 1991); *Second: Caplan v. American Baby Inc.*, 582 F. Supp. 869, 871 (S.D.N.Y. 1984) (copyright and trademark); *Third: WIXT Television v. Meredith Corp.*, 506 F. Supp. 1003, 1035 (N.D.N.Y. 1980); *City of Newark v. Delmarva Power & Light*, 497 F. Supp. 323, 326-27 (D. Del. 1980); *Realco Services, Inc. v. Holt*, 479 F. Supp. 880, 884 (E.D. Pa. 1979); *Miller & Son Pav. Co. v. Wrightstown Tp. Civ. Assn.*, 443 F. Supp. 1268, 1273 (E.D. Pa. 1978); *Bethlehem Plaza v. Campbell*, 403 F. Supp. 966, 971 (E.D. Pa. 1975); *Fifth: Spanish Intern. v. Leibowitz*, 608 F. Supp. 178, 182-84 (S.D. Fla. 1985); *St. Joseph's Hospital v. Hosp. Auth. of America*, 620 F.

threat of harassing litigation, and has erected safeguards for those guarantees." *Franchise Realty*, 542 F.2d at 1082. *See generally*, P. Areeda, *Antitrust Law* ¶203.4b (1982 Supp.). Likewise, the lower courts uniformly conclude "that the cost to society of permitting some unprotected speech to go unpunished . . . [is] outweighed by the danger that protected speech might be deterred by an overly broad prohibition." *Herzbrun v. Milwaukee County*, 504 F.2d 1189, 1197 (7th Cir. 1974) (Stevens, J., concurring). Petitioners here attempt exactly what *Claiborne Hardware* said cannot be done: Respondents' collective efforts "cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts." 458 U.S. at 933. Because RICO and the antitrust laws are *in pari materia*, the rule in *Franchise Realty* applies to RICO as well.

B. The District Court Properly Ordered and Relied Upon the RICO Case Statement in Dismissing the Complaint.

By August, 1990, this litigation appeared interminable. Petitioners had conducted nearly four years of

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Supp. 814, 833 & n.22 (D. Ga. 1975); *City of Gainesville v. Florida Power & Light Co.*, 488 F. Supp. 1258, 1266-67 (S.D. Fla. 1980). *Sixth: Letica Corp. v. Sweetheart Cup Co., Inc.*, 790 F. Supp. 702, 705-06 (E.D. Mich. 1992); *Seventh: Premier Elec. Cons. Co. v. Int'l Brotherhood of Electrical Workers*, 627 F. Supp. 957, 966 (N.D. Ill. 1985); *Eighth: Mark Aero Inc. v. Transworld Airlines*, 580 F.2d 288, 297 (8th Cir. 1978); *Ninth: Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991); *Tenth: Hydro-Tech. Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 n.8 (10th Cir. 1982).

discovery, and they were on their Second Amended Complaint. Respondents, however, had yet to be informed – with precision – of the scope of Petitioners' wide-ranging claims for relief. Arguing that the First Amendment in the context of Petitioners' open-ended conspiracy allegations required more precision, Respondents requested the District Court to order a more definite statement under FRCP 12(e) (R.335), or the filing of a RICO Case Statement under FRCP 16 (R.360). On February 4, 1991, the District Court ordered the filing of a RICO Case Statement (R.430), which dramatically changed the character of the litigation before it and quickly, and appropriately, resulted in its termination with prejudice, soon after the RICO Case Statement was filed on March 18, 1991.

The complexity of civil RICO litigation today leads district courts to require plaintiffs to file RICO Case Statements, particularizing their legal allegations and the factual bases for them. This increased specificity facilitates judicial management of such complex litigation and its discovery. Some courts impose the requirement through a standing order. U.S. Dist. Ct. E.D. Wash. Local R. 8. Others impose it case by case, when a particularly complex civil RICO action occurs. Either way, district courts are rightly using the RICO Case Statement with greater regularity.[16]

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[16] *See, e.g., Smith v. Our Lady of the Lake Hosp.*, 960 F.2d 439, 445 (5th Cir. 1992); *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992); *Homico Const. & Development Co. v. Ti-Bert Systems, Inc.*, 939 F.2d 392, 393 (6th Cir. 1991); *Dennis v. General Imaging, Inc.*, 918 F.2d 496, 510 (5th Cir. 1990); *Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1510 (10th Cir. 1990); *Marriott Bros. v. Gage*, 911 F.2d 1105, 1106 (5th Cir. 1990); *Landry v. Air Line Pilots*

The utility of a RICO Case Statement in curtailing abusive RICO suits is manifest, a lesson the District Court below learned when Petitioners filed their RICO Case Statement, which exposed the baseless character of Petitioners' sweeping Complaint. Nationwide, district courts are considering the more definite allegations contained in such statements in deciding FRCP 12(b)(6) motions.[17]

Ass'n Intern. AFL-CIO, 901 F.2d 404, 426 n.75 (5th Cir. 1990), *cert. denied*, 498 U.S. 895 (1990); *Meridan Mort. Corp. v. Spivak*, 1993 WL 193364, *1 (E.D. Pa. 1993); *Cardwell v. Sears Roebuck and Co.*, 821 F. Supp. 406, 407 n.3 (D. S.C. 1993); *W.E. Darin Const. Enterprises, Inc. v. Detroit Coke Co.*, 814 F. Supp. 325, 330 (W.D. N.Y. 1993); *Franks v. O'Connor Corp.*, 1992 WL 301266, *1 (E.D. Pa. 1992); *BML Group, Inc. v. U.S. Pizza, Inc.*, 1992 WL 220946, *1 (E.D. Pa. 1992); *Porter v. Shearson Lehman Bros. Inc.*, 802 F. Supp. 41, 53 (S.D. Tex. 1992); *Halbrecht v. Prudential-Bache Properties, Inc.*, 1992 WL 336757, *10 (D. Conn. 1991); *Chicago Housing Authority v. First Nat. Retirement Services, Inc.*, 1992 WL 168814, *4 (N.D. Ill. 1992); *Jeffreys v. Exten*, 784 F. Supp. 146, 157 (D. Del. 1992); *Albert Einstein Medical Center v. Physicians Clinical Services, Ltd.*, 1991 WL 280274, *1 (E.D. Pa. 1991); *Hunt v. Gouverneur Townhouse Partners-1988, L.P.*, 1991 WL 253126, *1 (S.D.N.Y. 1991); *VSA v. Von Weise Gear Co.*, 769 F. Supp. 1080, 1081 (E.D. Mo. 1991); *Delta Pride Catfish, Inc. v. Marine Midland Business Loans, Inc.*, 767 F. Supp. 951, 968 (E.D. Ark. 1991).

[17] *See, e.g., Parker & Parsley Petroleum Co. v. Dresser Industries*, 972 F.2d 580, 584 (5th Cir. 1992) (affirming dismissal), *reh. en banc denied*, 985 F.2d 555 (5th Cir. 1993); *McLaughlin v. Anderson*, 962 F.2d 187, 189 (2d Cir. 1992) (affirming dismissal); *Glessner v. Kenny*, 952 F.2d 702, 712 n.9 (3d Cir. 1991) (affirming dismissal); *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 44 n.3 (1st Cir. 1991) (affirming dismissal); *Kramer v. Bachan Aerospace Corp.*, 912 F.2d 151, 153 (6th Cir. 1990) (affirming dismissal); *O'Malley v. O'Neill*, 887 F.2d 1557, 1559 (11th Cir. 1989) (affirming dismissal), *cert. denied*, 496 U.S. 926 (1990); *Old Time Enterprises, Inc. v. International Coffee Corp.*, 862 F.2d 1213, 1216 (5th Cir. 1989) (affirming dismissal); *Michaels Bldg. Co. v. Ameritrust*

Likewise, courts are finding them useful to clarify issues in the context of summary judgment motions under FRCP 56.[18] This Court ought to use this appeal now to endorse

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Co., N.A., 848 F.2d 674, 677 (6th Cir. 1988) (reversing dismissal); *Cardwell v. Sears Roebuck and Co.*, 821 F. Supp. 406, 407 (D. S.C. 1993) (granting 12(b)(6) motion); *W.E. Darin Const. Enterprises Inc. v. Detroit Coke Co.*, 814 F. Supp. 325, 330 (W.D.N.Y. 1993) (granting 12(b)(6) motion); *Sheperd v. American Honda Motor Co. Inc.*, 822 F. Supp. 629 n.1 (N.D. Cal. 1993) (granting 12(b)(6) motion); *Aloe Coal Co. v. International Union, United Mine Workers of America*, 1992 WL 465768, *3 (W.D. Pa. 1992) (granting 12(b)(6) motion); *Chartrand v. Chrysler Corp.*, 785 F. Supp. 666, 668 (E.D. Mich. 1992) (granting 12(b)(6) motion); *Casper v. Paine Webber Group, Inc.*, 787 F. Supp. 1480, 1492 (D. N.J. 1992) (granting 12(b)(6) motion); *Queen Village Pharmacy, Inc. v. American Federation of State, County and Mun. Employees Dist. Council 33*, 1992 WL 25778, *1 (E.D. Pa. 1992) (granting 12(b)(6) motion); *Jeffreys v. Exten*, 784 F. Supp. 146, 157 (D. Del. 1992) (granting 12(b)(6) motion); *Hunt v. Gouverneur Townhouse Partners-1988, L.P.*, 1991 WL 253126, *1 (S.D.N.Y. 1991) (denying 12(b)(6) motion).

[18] *Dennis v. General Imaging, Inc.*, 918 F.2d 496, 510 (5th Cir. 1990) (affirming summary judgment); *Marriott Bros. v. Gage*, 911 F.2d 1105, 1106 (5th Cir. 1990) (affirming summary judgment); *Landry v. Air Line Pilots Ass'n Intern. AFL-CIO*, 901 F.2d 404, 426, n.75 (5th Cir. 1990) (reversing summary judgment), *cert. denied*, 498 U.S. 895 (1990); *Meridian Mort. Corp. v. Spivak*, 1993 WL 193364, *1 (E.D. Pa. 1993) (granting summary judgment); *Franks v. O'Connor Corp.*, 1992 WL 301266, *1 (E.D. Pa. 1992) (granting summary judgment); *BML Group, Inc. v. U. S. Pizza, Inc.*, 1992 WL 220946, *1 (E.D. Pa. 1992) (granting summary judgment); *Porter v. Shearson Lehman Bros. Inc.*, 802 F. Supp. 41, 53 (S.D. Tex. 1992) (granting summary judgment); *Delta Pride Catfish Inc. v. Marine Midland Business Loans, Inc.*, 767 F. Supp. 951, 968 (E.D. Ark. 1991) (granting summary judgment). Here, too, the Government's suggestion that a RICO Case Statement is (only) "an extension of the pleadings" (Gov. Br. 2-3) is inaccurate.

RICO Case Statements may also be used in assessing whether Rule 11 sanctions should be imposed. *See, e.g., Smith v.*

their use as a method of judicial administration to curtail abusive RICO suits, not only, as here, in the sensitive area of the First Amendment, but also in the area of commercial litigation, where most RICO suits are filed.[19]

Our Lady of Lake Hosp., Inc., 960 F.2d 439, 445 (5th Cir. 1992) (holding district court abused its discretion in imposing Rule 11 sanctions). Such statements, too, usefully focus discovery. *See, e.g., Michaels Bldg. Co. v. Ameritrust Co. N.A.*, 848 F.2d 674, 680 (6th Cir. 1988).

[19] At least three sources may be given as authority for adopting the RICO Case Statement procedure. First, courts cite Rule 11 as giving them authority to compel filing of the RICO Case Statement. For example, a standing order may state on its face that the RICO Case Statement is authorized as "a result of the, reasonable inquiry, required by Fed. R. Civ. P. 11." U.S. Dist. Ct. E.D. Wash. Local R.8. Numerous courts also cite Rule 11 concerns as the motivating factor behind their orders. *See, e.g., Kingston Square Tenants Ass'n v. Tuskegee Gardens, Ltd.*, 792 F. Supp. 1566, 1582 (S.D. Fla. 1992); *Alexander v. Jenkins*, 1990 WL 98966, *5 (E.D. Pa. 1990); *John L. Motley Associates, Inc. v. Rumbaugh*, 97 B.R. 182, 186 (E.D. Pa. 1989); *Kurz v. Mairone*, 1987 WL 28360, *4 (E.D. Pa. 1987); *R.M. Perez & Associates, Inc. v. Welch*, 1987 WL 10869, *1 (E.D. La. 1987); *Robinson v. Mount Vernon Realty, Inc.*, 1986 WL 22212, *1 (D.D.C. 1986). Second, Rule 12(e) is cited to provide authority for the district courts' actions. *Old Times Enterprises, Inc. v. International Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989); *Landry v. Airline Pilots, Ass'n*, 1988 WL 27036, *8 (E.D. La. 1988), *aff'd in part, rev'd in part on other grounds*, 901 F.2d 404 (5th Cir. 1990), *cert. denied*, 498 U.S. 895 (1990). Third, because Rule 16 provides trial judges with broad powers to manage the pretrial process, especially in "potentially difficult or protracted actions that may involve complex issues," courts justify their use of RICO Case Statements as an aspect of their power to control pretrial management. *United Power Ass'n, Inc. v. L.K Comstock & Co.*, 1990 WL 120674, *1 (D. Minn. 1990); *Dictor Capital Corp. v. Feingold*, 1988 WL 34250, *1 (E.D. Pa. 1988). *See generally*, N.Y. State Bar Ass'n Commercial & Fed.

C. Procedural Rules and Equitable Considerations Preclude Petitioners from Repleading.

Equitable considerations preclude Petitioners from repleading at this stage. This appeal does not come to this Court with a quick dismissal after the filing of a single complaint. The litigation extended over nearly five years, with extensive discovery. Petitioners had several opportunities to replead. In addition, they were clearly put on notice that specificity in pleading was required in the RICO Case Statement. Petitioners never asked to replead in response to the motions to dismiss. In fact, at no point in this litigation, have Petitioners asked to replead after being made aware of *all* defects in their complaint – after dismissal in the District Court, in the Court of Appeals, in their petition for certiorari, or in their opening brief in this Court. Dismissal after such extensive proceedings precludes repleading.[20]

Litig. Sec., *The Civil RICO Case Statement* (1989) [*1990*] RICO Bus. Disputes Guide – [CCH] ¶7453 (May 1990). These rules – singularly or in combination – are more than adequate sources of authority for the ordering of RICO Case Statements.

Similar orders are used in the antitrust area. *See, e.g., Von Poppenheim v. Portland Boxing & Wrestling Comm.*, 442 F.2d 1047, 1049-53 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972). They are also recommended procedure in the *Manual for Complex Litigation* §21.33 (2d ed. 1985).

[20] *Cf. Moody v. FMC Corp.*, 995 F.2d 63, 66 (5th Cir. 1993) (no amendment allowed after two years of litigation, extensive discovery, expert witnesses hired, trial underway); *Wade v. Hopper*, 993 F.2d 1246, 1249 (7th Cir. 1993) (no amendment allowed; defendants would have been prejudiced if plaintiffs permitted to replead after two prior amendments); *Ashe v. Corley*, 992 F.2d 540 (5th Cir. 1993) (denial of third amendment upheld four years

Moreover, the federal rules of civil procedure bar any repleading by Petitioners. Petitioners did not seek to amend their Complaint before it was dismissed. After the case was dismissed in its entirety by the District Court, Petitioners failed to seek leave to amend after reopening the judgment by way of FRCP 15(a), 59(e) or 60(b), as required.[21] No request was made to replead or for a continuance to pursue additional discovery to supplement the RICO Case Statement. *United States v. Private Sanitation Industry Ass'n*, 995 F.2d 375, 377 (2d Cir. 1993). Leave to amend is subject to the discretion of the district court (*Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 330 (1971); *Wade v. Hopper*, 993 F.2d 1246, 1248 (7th Cir. 1993)), and that discretion cannot be abused where leave is never requested. *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1041-42 (6th Cir. 1991); *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 881 (1st Cir. 1991); *Carl Sandburg Village Condominium Assn. v. First Condominium Dev. Co.*, 758 F.2d 203, 206 n.1 (7th Cir. 1985). This action, therefore, was properly dismissed with prejudice.

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after original complaint filed); *Browning Ave Realty Corp. v. Rosenshein*, 774 F. Supp. 129 (S.D.N.Y. 1991) (no amendment in RICO action allowed after two years of litigation, discovery extensive, depositions of most principals taken).

[21] *Confederate Memorial Assn. Inc. v. Hines*, 995 F.2d 295, 299 (D.C. Cir. 1993); *Humphreys v. Roche Biomedical Lab. Inc.*, 990 F.2d 1078, 1082 (8th Cir. 1993); *Glenn v. First National Bank*, 868 F.2d 368, 369 (10th Cir. 1989); *Dorn v. State Bank of Stella*, 767 F.2d 442 (8th Cir. 1985); *Wayne Inv. Inc. v. Gulf Oil Corp.*, 739 F.2d 11, 15 (1st Cir. 1984); *Czeremcha v. Intern. Assn. of Mach. & Aero Workers*, 724 F.2d 1552, 1556 (11th Cir. 1984); *Elfenbein v. Gulf & Western Industries, Inc.*, 590 F.2d 445 (2d Cir. 1978).

D. This Case was also Properly Dismissable under FRCP 56 Because Petitioners Presented Discovery and Deposition Material outside the Pleadings in Their RICO Case Statement.

In dismissing the complaint, the District Court extensively relied, not only on the Complaint, but also on the facts set out in RICO Case Statement.[22] While the Court expressly relied on FRCP 12(b)(6) in dismissing Petitioners' action, 765 F. Supp. at 939, the Court was entirely justified in coverting the motion to dismiss under FRCP 12(b)(6) into a motion for summary judgment under FRCP 56(c) and dismissing the case with prejudice because the RICO Case Statement relied on "matters outside of the pleadings."[23]

FRCP 12 requires that "all parties shall be given reasonable opportunity to present all materials . . . pertinent" to the issues when the court converts a FRCP 12(b)(6) motion to a FRCP 56 motion. Moreover, when

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[22] 765 F. Supp. 937, 941 (¶9; J.A. 108) (source of donations), 943 n.4 (¶15; J.A. 112-13 (nature of injury)), 944 n.5 (¶2; J.A. 88 (basis of liability) (Exhibit A)); ¶3; J.A. 89 (other wrongdoers (Exhibit B)); ¶5; J.A. 92-93 (prior criminal convictions); ¶5(g); J.A. 97 (common scheme (Exhibits A & B)); and ¶8; J.A. 107-08 (nature of extortionate activity)).

[23] FRCP 12(b), in pertinent part, provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.

parties are "otherwise apprised of the conversion," however, no error is committed by making such a conversion without formal notice.[24] However, the absence of formal notice is excused when it is harmless.[25] Here, of course, Petitioners themselves provided the District Court with a statement of facts that relied on matters outside of the pleadings. They can hardly now contend, as sophisticated litigators, that they were not on notice that the District Court could dismiss the action, if warranted, under Rule 56 or that they did not have a "reasonable opportunity" to present all pertinent material under Rule 12(b).

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[24] 5A C. Wright and A. Miller, *Federal Practice and Procedure* §1366, 506 (1990); *Clark v. Tarrant County*, 798 F.2d 736, 745-46 (5th Cir. 1986) (court's acceptance of material from outside the pleadings was sufficient in itself to notify plaintiffs of the possibility of conversion); *Salveson v. Western States Bankcard Association*, 731 F.2d 1423, 1430 (9th Cir. 1984) (same); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 393 (6th Cir. 1975) (same). *But see Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985); *Powell v. United States*, 849 F.2d 1576, 1577 (5th Cir. 1988).

[25] 5A C. Wright and A. Miller, *supra* §1366, 506 n.26 (1990); *Bell v. Chesapeake & Ohio R.R. Co.*, 929 F.2d 220, 222 (6th Cir. 1991) (affirming summary judgment as failure to notify was harmless error); *Rose v. Bartle*, 871 F.2d 331, 342 (3d Cir. 1989) (affirming the summary judgment in part and reversing in part); *Farries v. Stanadyne/Chicago Div.*, 832 F.2d 374, 377 (7th Cir. 1987) (affirming summary judgment even though the district failed to notify parties it was converting 12(b)(6) motion into one for summary judgment under FRCP 56); *Moody v. Town of Weymouth*, 805 F.2d 30, 31-32 (1st. Cir. 1986) (affirming summary judgment because parties were not prejudiced by lack of notice of conversion). *See also Fernandez-Montes v. Allied Pilots Assn.*, 987 F.2d 278 (5th Cir. 1993) (*sua sponte* dismissal was harmless).

This Court is, likewise, not limited by the label affixed to the District Court's judgment,[26] as it recognized long ago in *Romero v. International Term. Co.*, 358 U.S. 354, 357 n.4 (1959) ("[W]e need not restrict our disposition . . . merely because the proceedings below were inartistically labeled.").[27] Accordingly, the action was properly dismissed with prejudice as the granting of a motion for summary judgment on the merits.

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[26] *See generally*, 5A Wright & Miller, *Federal Practice and Procedure* §1366, 497 (1990).

[27] *See Bell v. Chesapeake*, 929 F.2d 220, 222 (6th Cir. 1991) ("[a]s an appellate court, we are not bound to the label attached to the trial court's disposition of the case and may treat it as a summary judgment."). *See also, County Sanitation Dist. No. 2 v. Inland Container Corp.*, 803 F.2d 1074, 1078 (9th Cir. 1986); *Corwin v. Marney, Orton Invs.*, 788 F.2d 1063, 1064 (5th Cir. 1988) (in RICO case, used the summary judgment standard because the district court considered materials outside the pleadings), *appeal after remand*, 843 F.2d 194, *cert. denied*, 488 U.S. 924 (1988); *Downing v. Kunzig*, 454 F.2d 1230, 1231 n.2 (6th Cir. 1972) (court disposed of case, using summary judgment standard, even though the district court "disposed of the case . . . by [a] motion to dismiss" under 12(b)(6), because district court considered affidavits).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

PAUL BENJAMIN LINTON
Americans United for Life
343 S. Dearborn St. #1804
Chicago, Illinois 60604
(312) 786-9494

September 29, 1993

*Counsel for Respondents**

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* The able assistance of Marc Haefner (J.D. expected, Notre Dame, 1994), James Scott (J.D. expected, Notre Dame, 1995) and Robert McBride (J.D. expected, Notre Dame, 1995) is hereby acknowledged.

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No. 92-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

v.

JOSEPH M. SCHEIDLER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONERS

Of Counsel:

LOWELL E. SACHNOFF
JACK L. BLOCK
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000

ALAN M. POLLACK
MITCHELL G. MANDELL
SCOTT A. SOMMER
POLLACK & GREENE
757 Third Avenue
New York, New York 10017
(212) 421-5300

FAY CLAYTON
Counsel of Record
SUSAN VALENTINE
JUDI A. LAMBLE
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

Counsel for the Petitioners

PETITION FOR CERTIORARI FILED NOVEMBER 2, 1992
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I. RESPONDENTS FAIL TO FIND AN ECONOMIC MOTIVE REQUIREMENT IN RICO

A. Respondents Cannot Avoid RICO's Plain Language

Despite over 260 pages of briefs, Respondents and their *amici* fail to locate an economic motive requirement in the text of RICO. Instead, they enlist a cacophony of statutory construction rules that ask the Court to ignore the plain language of the statute and engage in "a holistic endeavor" (Scheidler, *et al.* at 9, 22, n.32), examine context and common law background (*id.* at 22, 41; Terry, *et al.* at 16), apply the rule of lenity (Ohio Right to Life Society, Inc., *et al.* at 23), and use statutory construction rules in effect in 1970 (Scheidler at 22-23 n.32).

Yet Respondents do not dispute this Court's long-standing rule that a statutory term must be ambiguous before the Court will resort to secondary methods of interpretation. *United Sav. Ass'n v. Timbers of Inwood Forest*, 484 U.S. 365, 371 (1988) (*ambiguous* provision may be clarified by holistic statutory construction); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 508-09 (1989) (look to legislative history and statute's structure to construe *ambiguous* text); *Russello v. United States*, 464 U.S. 16, 29 (1983) (rule of lenity does not apply to unambiguous RICO provisions); *Caminetti v. United States*, 242 U.S. 470, 485 (1917). *See also* Petitioners' Brief ("P.Br.") at 16-18.

The terms at issue here, "enterprise" and "racketeering activity," are not ambiguous. This Court held as much in *United States v. Turkette*, 452 U.S. 576, 581, 587 n.10 (1981) (no uncertainty in the meaning of "any union or group of individuals associated in fact"), and in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 232 (1989) (noting precise definition of what "racketeering activity" "means"). There is no reason to launch into other methods of statutory construction.[1]

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[1] The "clear statement rule" does not apply because RICO does not criminalize constitutionally protected speech. *See Alexander v. United States*, 113 S.Ct. 2766, 2768 (1993). *See also* pp. 14-15 *infra*. Although Respondents ask the Court to look beyond RICO's text for elements they say are "implicit" in

B. Respondents Search In Vain for an Economic Motive Requirement in RICO

Looking to RICO's title, findings, definitions, substantive provisions and remedies, Respondents search in vain for evidence of an economic motive requirement. Nothing in the title suggests it. Respondents' torture of the meanings of "racketeer" and "corrupt" cannot convert these words into economic terms that limit RICO's scope.[2] Moreover, titles do not supersede a statute's plain language. *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947).

The findings prefacing the Organized Crime Control Act of 1970 ("OCCA"), Pub. L. 91-452, 84 Stat. 922, demonstrate Congress's concern with the economic *effects*, not motives, of racketeering. The first and fourth findings refer to the drain of money from the economy and the burden of racketeering on interstate commerce. The second and third show Congress's concern with both the money *and* power that enable racketeers to hurt the national economy. The findings do not reflect the simple focus on ill-gotten gains that Respondents suggest.

Respondents' definitional arguments advance their theory no further. They contend that because "person" is defined to "include" any individual or entity capable of holding an interest in property, RICO must be aimed only at financially-motivated actors. This argument contradicts Respondents' own contention that they -- who indisputably can and do hold interests in

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the statute, Migliorino at 15, interpretating stated terms does not mean inventing new ones -- a rule this Court has consistently followed with RICO. *Compare Holmes v. Sec. Investor Protection Corp.*, 112 S.Ct. 1311, 1316-17 (1992) (interpreting "by reason of"), and *H.J.*, 492 U.S. at 238-39 (interpreting "pattern"), *with Turkette*, 452 U.S. at 580-81 (refusing to invent "legitimate business" requirement).

[2] Respondents suggest that "racketeer" and "corrupt" involve money and bribery. Scheidler at 13. But the same dictionary Scheidler quotes defines racketeer as "[a] member of a gang or association of criminals practicing extortion, intimidation, violence, and other illegal acts on a large scale...." *Oxford English Dictionary*, Vol. XIII, pp. 81-82 (2d ed. 1989). "Corrupt" is defined first as "depraved, spoiled." *Id.* at Vol. III, pp. 972-73.

property -- are not economically motivated.[3] Scouring definitions of enterprise, Respondents' search for an economic motive requirement fares no better. The notion of "gain" does not pervade the definition of enterprise: an individual and a "group of individuals associated in fact although not a legal entity" are hardly marked by their economic motive.[4] The definition's inclusion of "any" individual or association in fact nullifies the exclusions Respondents advocate. *Contra* Terry at 19-20.[5] The restriction of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(r) (Supp. 1993), to enterprises that operate "for a common business purpose," *see* Terry at 21, reinforces the breadth of RICO's enterprise definition. The FLSA definition highlights Congress's awareness that "enterprise" does not necessarily imply "business enterprise" and underscores the decision to require that FLSA enterprises -- in contrast to RICO enterprises -- have a "business" purpose. The FLSA comparison also reinforces Petitioners' unrebutted argument that Congress's use of "business enterprise" in certain titles of OCCA, but not in RICO, shows that Congress drafted RICO to reach both financially- and nonfinancially-oriented enterprises. P.Br. at 25-26.

Unable to avoid the precise and unambiguous definition of "racketeering activities" (the statute says "'racketeering activity' means...") and the fact that many of the predicate offenses are,

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[3] The definition of "person" makes sense not because it calls for *acquiring* property but because it reaches plaintiffs whose business or property can be injured and defendants who can pay damages.

[4] Nor does commerce necessarily flow from the definition of enterprise, *see* P.Br. at 21-22, notwithstanding Terry's hopscotch approach to what he calls "the first *concrete* definition" of the term. Terry at 20 (emphasis in original). RICO's only statutory "commerce" requirement for an enterprise is the jurisdictional requirement that it affect interstate commerce. This is pled. JA-46-48.

[5] Terry incorrectly compares the "includes" of the enterprise definition with the "requires" of the pattern definition. In *H.J.*, 492 U.S. at 236-37, the Court found a need to clarify the definition of "pattern" because, unlike other RICO terms, "pattern" is defined only by what, at a minimum, is required. *Compare* 18 U.S.C. § 1961(4) *with* § 1961(5) (Supp. 1993).

on their face, non-economic crimes, Respondents creatively argue that "the thrust" of the violent offenses is commercial, since they may play an "instrumental role" in the "commercial activity of enterprises." Scheidler at 15. This illogical argument fails because RICO does not require that enterprises engage in "commercial activity" or that the predicate acts play a role in "commercial activity." The phrase "commercial activity" is significantly absent from the statute. The argument that the definition of racketeering activities supports an economic motive requirement flies in the face of § 1961(1), since predicate acts such as murder, arson and obstruction of justice are not inherently economic crimes.

Turning to the substantive provisions of § 1962, Respondents fail to rebut Petitioners' opening argument that § 1962(c) consciously expands the scope of RICO beyond the misconduct addressed by §§ 1962(a) and (b). Sections 1962(a) and (b) do not require an economic motive, but even if they did, § 1962(c) reaches more broadly. P.Br. at 27-29.[6]

Respondents argue that RICO's forfeiture and treble damage provisions prove that Congress intended RICO to apply only to those who profit from their racketeering. While RICO's remedial provisions clearly punish those who profit, there is no indication that these provisions were meant to limit liability. To the contrary, RICO's treble damages provision was designed to remedy economic *injury* and provide an incentive to "bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are

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[6] Respondents seek support for an economic motive requirement in the phrase "conduct of such enterprise's affairs through a pattern of racketeering activity." They argue that racketeering "activity" means action but "affairs" means either action or commercial business. So that different words have different meanings, they contend that "affairs" must mean commercial business. Their reasoning skips two essential steps. "Racketeering activity" is a defined term; "activity" cannot be construed separately. Since racketeering activity does not mean "action," as they claim, affairs can and should be given its normal meaning, *see H.J.*, 492 U.S. at 238, which, Respondents point out, is "action," and not necessarily commercial business. *Cf.* Scheidler at 16.

deemed inadequate." *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 151 (1987). *See also Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 493 (1985).

C. Even Respondents' Version of RICO's Legislative History Shows that Congress Did Not Require Economic Motives

Respondents' foray through RICO's legislative history only corroborates the absence of an economic motive limitation. As Respondents help demonstrate, Congress was primarily concerned with the economic *effects* (not purposes or motives) of racketeering. *See, e.g.*, Scheidler at 35 n.78 (Title IX seeks to "free the channels of commerce," S.Rep. No. 617, 91st Cong., 1st Sess. 41 (1969) at 81); Migliorino at 40 (RICO is a tool to eradicate the "baneful influence of organized crime in our economic life," 116 Cong. Rec. 25,190 (1970)). The sponsor of S.1623 (a precursor to RICO) observed: "The proper functioning of a free economy requires that economic decisions be made by persons free to exercise their own judgment. Force or fear limits choice, ultimately reduces quality, and increases prices." 115 Cong. Rec. 6,993 (1969).[7]

Respondents also confirm that Congress did not choose to confine RICO to a particular class of criminals. *See, e.g.*, Scheidler at 25-26 (an early version of RICO was aimed at the Mafia, but the bill's sponsor changed that focus); Scheidler at 26-27, 29 (S.2048 and S.2049, RICO precursors, applied to "business enterprises"; when the bills were integrated, the "business" limitation was deleted, as it was from S.1623); Scheidler at 29 (when S.1861 was reported out of committee, white collar crimes were added to extend the bill's reach beyond the Mafia); Scheidler at 35 (in response to criticism from the

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[7] As Congress might have foreseen, the availability of women's health services has been compromised by PLAN's violence. In the first five months of 1993, arson and vandalism cost clinics $2 million. National Abortion Federation, *et al.* ("NAF") at 7. Doctors and staff have quit their jobs due to harassment, landlords have refused to renew clinics' leases and patients have cancelled appointments out of fear, causing a decrease in revenues. *Id.* at 12, 24.

American Civil Liberties Union ("ACLU"), the bill's sponsor acknowledged that RICO reached offenses committed by persons outside organized crime, 116 Cong. Rec. 18,914, 18,940 (1970). Thus, Respondents concede that even if RICO was prompted by a need to deal with mobsters, Congress abandoned that focus early on and instead aimed the bill at enterprise criminality, which is defined by conduct, not affiliation.[8]

D. Respondents' Policy Arguments Have Been Rejected By Congress and This Court

Respondents and their *amici* contend that without an economic motive requirement, RICO "federalizes" state law crimes in violation of states' rights. This Court soundly rejected that argument over a decade ago. *Turkette*, 452 U.S. at 586-87 ("Congress was well aware that it was entering a new domain of federal involvement" that would alter the federal role in the prosecution of racketeering acts).[9] RICO supplements, rather than restricts the criminal justice systems of the States. *Id.* at 586 n.9; *see also* States of New York, *et al.* ("States") at 3-12.

Respondents argue that unless RICO requires an economic motive, it duplicates other state and federal remedies for "actual violence" and other activities that "offend against the peace." Southern Center for Law & Ethics, *et al.* ("Houser") at 18; People for the Ethical Treatment of Animals ("PETA") at 3-4. There is nothing wrong with a federal statute that provides supplemental or even duplicative remedies for conduct already addressed elsewhere. *Wilson v. Garcia*, 471 U.S. 261, 279

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[8] Contrary to Scheidler's suggestion at 36-37 and 40 n.98, the legislative histories of Titles X and XI of OCCA do not show an intent to limit RICO to economically motivated enterprises or predicate acts. In declining to limit Title X to offenses listed in Title IX, Senator McClellan said nothing about whether Title IX applies to violent acts committed in the course of "political or social protest." 116 Cong. Rec. 846 (1970). The exclusion of Title XI's "explosive materials" crimes from RICO says nothing about whether RICO reaches non-economic enterprises and acts.

[9] The same argument was rejected as to the Hobbs Act. *United States v. Culbert*, 435 U.S. 371, 379-80 (1978).

(1985) (42 U.S.C. § 1983 was enforceable whether or not it duplicated state remedies). More importantly, RICO provides a unique and necessary tool for prosecutors and private plaintiffs to use against those who "have succeeded in placing themselves above the law." 116 Cong. Rec. 18,913 (1970) (Sen. McClellan). *See* States at 11, *passim.* RICO does not merely punish those who commit predicate offenses, it reaches the decision-makers at the hub of an enterprise controlled or operated through the commission of predicate crimes.[10] *Reves v. Ernst & Young*, 113 S.Ct. 1163, 1170 (1993) (to violate § 1962(c), one must play a part in directing the affairs of the enterprise). RICO provides a remedy, unavailable elsewhere, to the sustained nationwide violence that has been "overwhelming state and local law enforcement." States at 2-3, 8; NAF at 6; *see also Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753, 777 (1993) (Stevens, J. *dissenting*).[11] The grave injuries caused and threatened by enterprise criminality also explain why RICO's remedies are not disproportionate to the wrongs it is designed to remedy. *See Alexander v. United States*, 113 S.Ct. 2766, 2776 (1993) (petitioner was convicted not for selling a few obscene materials but for creating and managing "an enormous racketeering enterprise" over a substantial period of time).

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[10] RICO does not provide treble damages for simple conspiracy, as Houser suggests at 18. It remedies conspiracies to invest in, control, or operate an enterprise through the commission of racketeering crimes -- a complex undertaking that signals ongoing racketeering activities. 18 U.S.C. § 1962 (Supp. 1993). Under Respondents' argument, RICO would exempt all dangerous criminals seeking power rather than cash.

[11] The RICO Case Statement shows multiple arrests of co-conspirators who personally carried out the arson, vandalism, and other acts of force and violence organized by PLAN. Yet PLAN's violence has continued unabated. Between 1977 and July 21, 1993, there were 1380 acts of violence against abortion providers, 287 bomb threats, and 581 clinic blockades. From 1991 through mid-1993, 31 clinics were targets of arson and 220 clinics were vandalized. In the first seven months of 1993, death threats were made to 56 abortion providers; 119 more were stalked by anti-abortion extremists. NAF at 6.

E. Even Respondents Retreat From the Seventh Circuit's Unfounded Economic Motive Requirement

The motive requirement created by the Seventh Circuit so far exceeds similar requirements imposed in the Second and Eighth Circuits that even Respondents retreat from it. The Seventh Circuit required that "*the*" purpose or motive of an enterprise or predicate acts be economic. Petition for *Certiorari* ("Pet.") A-34. Respondents argue, instead, for what they call the "*Ivic/Bagaric*" requirement of some objective economic "dimension" or "goal." Scheidler at 19; Migliorino at 12; *Bagaric v. United States*, 706 F.2d 42, 53 n.11 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983). But unless Respondents concede that a *de minimis* economic dimension suffices, their rule would still create a litigation nightmare in determining how much and what kind of economic dimension is present and required in a given case. P.Br. 38-44.[12]

Under Respondents' "economic dimension" test, and even under the Seventh Circuit's motive requirement, this case should be reversed and remanded. Although Respondents claim that Petitioners allege "no mercenary purpose whatsoever," Terry at 25-26, they do not attempt to rebut the catalog of financial incentives discussed by Petitioners, P.Br. at 46-48, other than to say that those monies flow from donations. Under this logic, RICO would exempt sham 501(c)(3) corporations run by mobsters, as well as publicly-funded government bodies. There

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[12] Despite their own dispute with the Seventh Circuit, Respondents argue that the economic motive requirement is "settled law" that cannot be overruled without creating retroactive legislation. Scheidler at 9. The square split between the Third and Seventh Circuits on the economic motive issue, the inconsistent scope and application of the requirement in the Second and Eighth, United States at 14, American Medical Association, *et al.* ("AMA") at 15-20, and the absence of such a requirement in other circuits, P.Br. at 36-37, show that there is no "settled law."

The Attorney General's comment that existing federal law could not be relied upon to stop clinic violence was entirely accurate, given the split in the circuits. Federal prosecutors also have been prevented from using RICO in other terrorism cases. *See, e.g.*, Deborah Pines, *Why U.S. Didn't Use RICO Against Sheik*, 210 N.Y.L.J. 43 (1993).

is no express or implied reason to exclude such enterprises and to do so would encourage organized crime to use them.

The predicate acts here are also motivated, at least in part, by Respondents' desire for personal gain. Except Migliorino, Respondents have all risen to paid positions only after committing crimes that subjected them to arrest. Generous contributions at the sites of clinic blockades encourage and reward them. P.Br. at 47 n.40. The more outrageous their acts, the more likely the enterprise is to receive large donations, and the more likely the PLAN member is to be richly compensated. JA-108. There is no doubt that Respondents enjoy a far higher standard of living as a result of their commission of predicate acts for PLAN. For each of these men, the enterprise is their full-time job. It is not credible that they wholly lack an economic motive.[13]

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[13] Respondents' ancillary "motive" arguments also fail. The antitrust laws support Petitioners, not Respondents, for the Sherman Act, 15 U.S.C. § 1, *et seq.* (1973), does not exempt "political or social protest." Good motives are irrelevant to antitrust liability. *E.g., NCAA v. Bd. of Regents*, 468 U.S. 85, 101 n.23 (1984). *See also Council of Defense v. Int'l Magazine*, 267 F. 390 (8th Cir. 1920) (politically-motivated boycott violated Sherman Act). Contrary to Migliorino's arguments, *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), stressed that a restraint on trade is unlawful if it is designed to have or does have an *effect* on the market or consumers. *Id.* at 500-504. The Complaint here meets even antitrust standards. *See* JA-39-41, 45 (PLAN conspired to force clinics to close beginning in the most concentrated markets). *See also* Pet. at 13-28. *Summit Health, Ltd. v. Pinhas*, 111 S.Ct. 1842, 1846 n.10 (1991), reaffirms Congress's intent not to create exceptions to the Sherman Act. *Contra* Migliorino at 17.

Scheidler's "state of mind" argument ignores settled case law that no criminal intent is required for RICO other than that inherent in the underlying offenses. *E.g., United States v. Boylan*, 620 F.2d 359, 361-62 (2d Cir.), *cert. denied*, 449 U.S. 833 (1980); *see also* Pet. A-32 (no motive requirement under Hobbs Act). Terry's reliance on *Bray* for an implied "purpose" element is misleading: *Bray* construed 42 U.S.C. § 1985(3), which contains an express "purpose" requirement; RICO does *not* contain one.

Respondents also challenge Petitioners' standing, but they ignore three facts: (1) NOW has standing to represent its members, *see Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); (2) this is a class action on behalf of clinics nationwide and representatives need only be adequate and typical of the class, *Fed. R. Civ. P. 23, see also* R.61, 297; and (3) the named

II. THE REQUISITE PREDICATE ACTS ARE PLED

Respondents urge that they have not committed any predicate acts because they have not committed Hobbs Act extortion. This argument, which the Court has declined to review, was rejected by both lower courts, Pet. A-32 n.17, is not properly before the Court, and is not dispositive of the question on which review was granted.[14] Furthermore, forty-five years of case law shows that the Hobbs Act extortion *is* properly pled.

A. Hobbs Act Extortion is Pled

The Hobbs Act, 18 U.S.C. § 1951 (1984), "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree.'" *Stirone v. United States*, 361 U.S. 212, 215 (1960). Respondents argue that they have not obtained property or used force, violence or fear.

1. Respondents Extorted Petitioners' Property Rights

Respondents argue that the Complaint fails to allege "property" under the Hobbs Act. Terry at 39-40, n.37. While he concedes, as he must, that property need not be tangible, *Carpenter v. United States*, 484 U.S. 19 (1987), he confuses

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plaintiff clinics were injured by the RICO violations, *e.g.*, JA-41-62 ¶¶ 6, 7, 43-46, 64-78. Contrary to Terry's claims, co-conspirators, unlike mere organizational members, *are* agents of one another, so Terry, like each conspirator, is liable for all the harm caused by the conspiracy. *See Pinkerton v. United States*, 328 U.S. 640 (1946).

[14] U.S. Sup. Ct. R. 14.1(a) provides "only the question set forth in the petition, or fairly included therein, will be considered by the Court." Issues not within the grant of *certiorari* need not be considered. *Bray*, 113 S.Ct. at 765 n.10. Although two Respondents proposed Hobbs Act extortion as an alternative question, the Court declined review on this issue. Respondents' Hobbs Act arguments are not determinative of the issue on which review was granted: whether RICO requires an economic motive. *See Yee v. City of Escondido*, 112 S.Ct. 1522, 1533 (1992) (refusing to address a "related" issue because it would not assist in resolving the question accepted for review).

property with what he calls "abstract" interests. Property is a broad term that includes all rights "protected by the government," *Black's Law Dictionary* 1216-18 (6th ed. 1990). It is a concept that goes back to English law, *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853).[15] Petitioners have pled extortion of *property*, not abstract interests.[16]

Respondents also argue, without authority, that the Hobbs Act "obtaining of property" requirement must be bifurcated into two separate elements, "obtaining" and "property," the first of which they say means "receiving."[17] Extortion does not require

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[15] Property rights arise whenever rules or understandings "secure certain benefits" and "support claims of entitlement to those benefits." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (relied on in *Carpenter* for the rule that intangible interests subject to the Taking Clause are property); *Goldberg v. Kelly*, 397 U.S. 254, 261, n.8 (1970) (due process is required to terminate welfare benefits). In the Hobbs Act context, property has been defined as "any valuable right considered as a source or element of wealth." *United States v. Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970).

[16] Class member clinics and patients have common law entitlements to the benefit of their business relations with one another and with suppliers and landlords; clinic employees have a common law entitlement to continued employment. *See* Restatement (Second) of Torts § 766, note d; § 766B, note c (1989). Respondents have extorted these property rights. *See* JA-66-71 ¶ 98.

[17] Respondents distort cases they claim support them. *United States v. Nedley*, 255 F.2d 350 (3d Cir. 1958), which they say "squarely held" that "obtaining" means "taking," is based on robbery, not extortion. Both *Nedley* and *People v. Squillante*, 185 N.Y.S.2d 357 (Sup. Ct. 1959), were decided *after* the Hobbs Act was enacted; they reveal nothing about what Congress had in mind when it passed the Act. *People v. Ryan*, 232 N.Y. 234, 235 (1921), discussed property only in *dicta*, noting that extorting *or* gaining property would suffice. *See also, People v. Wisch*, 296 N.Y.S. 2d 882 (Sup. Ct. 1969) (finding extortion where nothing was "received"). *United States v. Enmons*, 410 U.S. 396 (1973), dealt with the labor exemption and said nothing about whether property must be "received" to be deemed extorted. In twenty years, no court has adopted Respondents' reading of *Enmons*. *See United States v. Cerilli*, 603 F.2d 415, 419 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980) (warning against application of *Enmons* outside labor context). Further, Respondents "obtain" both Petitioners' patients, whom they take to "fake" clinics, JA-40, 42-43, and Petitioners' agreement not to perform abortions.

that the extorter receive anything. *United States v. Green*, 350 U.S. 415, 420 (1956). Instead, the crime focuses on loss to the victim. *E.g., United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *United States v. Lance*, 536 F.2d 1065, 1068 (5th Cir. 1976); *United States v. Santoni*, 585 F.2d 667, 673 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979).[18] The "obtaining property" requirement cannot be bifurcated without overturning forty-five years of Hobbs Act jurisprudence. If Respondents' interpretation were correct, intangible property such as the rights to vote, assemble and speak in a union setting and to make business decisions free of coercion, which cannot be "received" by another person, would be exempt from Hobbs Act protection. Case law uniformly holds to the contrary.[19]

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[18] Ironically, Terry attempts to distinguish between extortion and what he calls "coercion" but then directs the Court to numerous states in which the offenses are combined into a single crime. *E.g.*, Colo. Rev. Stat. Ann. § 18-3-207 (West 1990); Fla. Stat. Ann. § 836.05 (West 1976); Mass. Gen. Laws Ann. ch. 265, § 25 (West 1990); Mich. Comp. Laws Ann. § 750.213 (West 1990). *See also* James Lindgren, *More Blacknail Ink: A Critique of Blacknail, Inc., Epstein's Theory of Blacknail*, 16 Conn. L. Rev. 909, 916-18 (1984) (citing extortion cases where nothing was "received"). Petitioners have alleged predicate acts of extortion in at least Colorado, Florida, Massachusetts, and Michigan, and those allegations alone satisfy the pattern of racketeering activity requirement. 18 U.S.C. §§ 1961(1) and (5). *See also United States v. Nardello*, 393 U.S. 286 (1969) (rejecting formalistic distinction between extortion and coercion under Travel Act; victim's silence was extorted).

[19] "Property" subject to the Hobbs Act includes the right to make a business decision free from outside pressure, *United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986); *Santoni*, 585 F.2d at 673; *Tropiano*, 418 F.2d at 1075-76 (2d Cir. 1969); the rights to nominate, vote, assemble, and speak in a union setting, *United States v. Local 560*, 780 F.2d 267, 281-82 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986); *United States v. Debs*, 949 F.2d 199, 201 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 2945 (1992); interests in business accounts and unrealized profits, *United States v. Nadaline*, 471 F.2d 340, 344 (5th Cir.), *cert. denied*, 411 U.S. 951 (1973); goodwill and customer revenues, *United States v. Zemek*, 634 F.2d 1159, 1173-74 (9th Cir.), *cert. denied*, 450 U.S. 916 (1981); and the right to make personal and business decisions about life insur-

2. Respondents Used Force, Violence and Fear

Respondents say that they do not use violence, but they ignore the host of violent acts listed in the Complaint and RICO Case Statement.[20] *See* p. 15 *infra*. Alternatively, they contend that "not a single reported decision suggests that the pursuit of social, moral or political goals through pressure tactics...constitutes federal criminal extortion." Terry at 42. In fact, ideological extremists who commit extortion, including Respondents' co-conspirators, have been prosecuted successfully under the Hobbs Act despite the causes they espouse; ideology has never provided an exemption to the crime. *E.g.*, JA-161; *United States v. Lewis*, 797 F.2d 358 (7th Cir. 1986) (defendant convicted although he claimed to be exposing corruption); *United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983) (abortion opponent who kidnaped doctor violated Hobbs Act); *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975) (conviction despite religious purpose); *United States v. Mitchell*, 463 F.2d 187 (8th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973) (job developer for the Congress of Racial Equality who threatened store owner violated Hobbs Act).

B. Many Predicate Acts Are Encompassed by the Complaint

Even if Respondents' Hobbs Act extortion argument were correct, the Complaint and RICO Case Statement allege numerous additional predicate acts.[21] Hobbs Act extortion is an

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ance, *United States v. Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985), *cert. denied*, 475 U.S. 1024 (1986). *See also People ex rel. Short v. Warden of City Prison*, 130 N.Y.S. 698, 700-01 (App. Div. 1911) (right to work is property under New York extortion law).

[20] Virtually every court that requires a RICO case statement considers it an extension of the pleading, like an amendment to the complaint. *E.g., McLaughlin v. Anderson*, 962 F.2d 187, 189 (2d Cir. 1992); *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 n.3 (1st Cir. 1991). *See also* Murphy at 20-21 n.16.

[21] Contrary to Respondents' arguments, federal pleading rules do not require legal conclusions or facts, but only allegations sufficient to state a claim. Fed. R. Civ. P. 8(a); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A complaint must be sustained if relief could be granted "under any set of facts that could be

overarching RICO predicate, embracing virtually all of Respondents' crimes, but the same allegations state RICO claims based on other predicates as well, including arson, kidnaping and extortion under state law; violation of 18 U.S.C. § 659 (1976) (taking property from interstate shipments); violations of the Travel Act, 18 U.S.C. § 1952(a) (Supp. 1993); and physical violence to persons or property under § 1951.[22] Only two predicate acts are needed to prove a pattern of racketeering activity. Even if Hobbs Act extortion is ignored, numerous predicate acts are stated in the allegations here.

III. RICO ACCOMMODATES THE FIRST AMENDMENT

A. The Complaint Addresses Criminal Conduct, Not Speech

Respondents argue that Petitioners attack "all pro-life activists." Fortunately, not all anti-abortion activists are terrorists;[23] the Complaint is directed at only a small but

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proved *consistent* with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (emphasis supplied). It need only contain allegations necessary for recovery on *any* legal theory, even a theory that was not suggested or intended by the pleader. *See* 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* § 1216 at 159 (1990). *See also* n.22 *infra*.

[22] *E.g.*, Arson is pled, *inter alia*, at JA-49, ¶¶ 40, 161-64, 166, 169, 171-72, 189, 195-06; kidnaping at JA-161; § 659 violations at JA-57-60; physical violence at JA-49 ¶ 40, -50 ¶¶ 42, 44, -67 ¶¶ 98(d) and (e), 99, 120, 136, 140, 142, 143, 160-66, 169, 171, 174, 183, 189, 190, 192, 195, 196; and violations of the Travel Act at JA-135-36, 139, 142-43, 158. As for state law extortion, see n.18 *supra*. Since the RICO Case Statement was filed, murder and attempted murder have occurred. Scheidler argues that the murder is "unrelated" to Respondents, but Dr. Gunn's "wanted" poster was prepared and circulated by Operation Rescue, and the murder was carried out by a group led by co-conspirator John Burt. *See* P.Br. at 5 n.3 and JA-50, 165. Terry ignores the record when he says the Respondents are not tied to arson. *See* Pet. A-3 n.5. Under *Hishon*, the facts of Dr. Gunn's murder (and the attempt on the life of Dr. George Tiller) are consistent with the pleadings. If additional pleading were needed, leave should be "freely given" to amend to state alternative theories of recovery. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

[23] The Complaint does not attack groups whose methods are peaceful. A comparison of the multitude of anti-abortion groups that filed amicus briefs in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), with the *amicus*

notorious radical fringe,[24] whose conduct the court below termed "reprehensible" and violent. Pet. A-15, 17, 33. Even the district court found the Complaint directed at "violence, force, threat, or harassment," not "legal, non-violent activity used by the Defendants to express their opposition to abortion." R.248 at 4.

Violence has characterized PLAN since its inception. PLAN designated 1985 "a year of pain and fear," JA-49, ¶ 40; dynamite has been PLAN's logo since 1986, J-49, ¶ 40. PLAN urges its people not to wait for legislative change, but to use "direct action" by "any and all means available," J-53; J. Scheidler, *Closed: 99 Ways to Stop Abortion* (1985) at 17.[25] It has said "no clinic will be spared."[26] PLAN tries to cast its forcible invasions of clinics as peaceful sit-ins, but they stand in marked contrast to the *non-violent* sit-ins of Dr. Martin Luther King, Jr., who refrained from violence even when provoked. PLAN's "sit-ins" involve physical attacks on patients, doctors and staff; damage to clinic property and equipment; and forcible obstruction of clinic entrances. As even the court below said, to suggest that the First Amendment protects such actions is "audacity." Pet. A-15.

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briefs filed in support of Respondents here is telling.

[24] These are the "organized and violent mobs across the country" to which Justice Stevens referred in *Bray*, 113 S.Ct. at 780 (*dissenting*) (1993).

[25] Respondents suggest that *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), which held that petitioning to secure government action does not violate the Sherman Act, protects them. The Seventh Circuit flatly rejected this argument because Respondents expressly abandoned governmental change; their primary objective is *not* to influence legislation. Pet. A-6, 15. *Cf.* Houser at App. 2a. (*Amicus* Houser, a former Operation Rescue leader, finally abandoned "rescue" activity when "opportunities for...legislation seemed available.")

[26] Even protected speech is admissible to show criminal intent. *Wisconsin v. Mitchell*, 113 S.Ct. 2194, 2201 (1993).

1. *Claiborne* Governs the First Amendment Issues Here

The parties and *amici* agree that *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), governs the First Amendment issues here. *Claiborne* carefully detailed the constitutional limits on laws that incidentally regulate social protest. It stressed that the presence of speech together with violence does not end judicial inquiry. *Id.* at 912. "The First Amendment does not protect violence. Certainly violence has no sanctuary in the First Amendment the use of weapons, gunpowder and gasoline may not constitutionally masquerade under the guise of 'advocacy'." *Id.* at 916.[27] *Wisconsin v. Mitchell*, 113 S.Ct. at 2199, reaffirmed that conduct that causes harm distinct from its communicative impact receives no protection. *See also Alexander*, 113 S.Ct. at 2774 (RICO does not criminalize protected speech); ACLU at 11.

Claiborne explained that while liability may not be based on mere membership in a group in which some commit violence, a person is liable for unlawful conduct that he or she authorizes or incites. 458 U.S. at 920 n.56.[28] *Accord* ACLU at 8, 15. While words of disapproval and social ostracism cannot support liability, *id.* at 921, an inflammatory "utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force." *Id.* at 923.[29] *See also*

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[27] To avoid punishing protected speech, *Claiborne*, 458 U.S. at 933-34, required evidence that the parties agreed to, engaged in or incited unlawful conduct. In a jury case, this is accomplished by instructions explaining that damages may be awarded *only* for consequences of unlawful conduct, not for protected speech. *E.g., Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1348-49 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989). Respondents' request for "heightened pleading standards" ignores these rules. *See also Leatherman v. Tarrant County Narcotics*, 113 S.Ct. 1160 (1993).

[28] PETA's "guilt by association" argument, at 28-29, is further answered by *Reves*, 113 S.Ct. 1163, which guarantees that parties who neither commit predicate acts nor manage the enterprise cannot be liable due only to their association with an enterprise. *See also* ACLU at 6, 12. Respondents here are the hardcore leaders and managers of PLAN, not peripheral associates.

[29] In an effort to fit PLAN's violence into the NAACP mold, Murphy claims

Cox v. Louisiana, 379 U.S. 559, 563 (1965) ("A man may be punished for encouraging the commission of a crime.").

2. Civil Disobedience is Not Protected Speech

Disregarding *Claiborne*, PETA suggests that if, in addition to "protected acts," a protester decides to "use another form of civil disobedience," that "other" conduct is also immune, *i.e.*, that protected speech gives lawless acts a free ride. Whether RICO applies to civil disobedience depends on what illegal acts the protester uses; unlawful conduct -- like that charged here -- may be punished.[30] *See Claiborne*, 458 U.S. at 933.

The violence and force at issue here are not "peripheral" or "incidental" to the enterprise. PLAN's chief tactics are forcible invasions and blockades.[31] If the Respondents did no more than annoy, ostracize or vilify their victims, we would not have filed this case. If they did not use threats, force and violence, there would be no predicate acts. But Respondents show no respect for the nation's laws and no tolerance for citizens who disagree with them. Whether they call it "civil disobedience" or

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that the NAACP used violence to enforce the boycott in *Claiborne*, and Houser says that Evers, a defendant in that case, incited violence. This is completely incorrect; the *absence* of a connection between these defendants and the violence led the Court to find them not liable. *Claiborne*, 458 U.S. at 906. *Compare* Evers' speech *with* that of co-conspirator John Burt, whose organization of the March 10, 1993, demonstration in Pensacola immediately preceded the murder of Dr. David Gunn at the hand of one of Burt's demonstrators.

[30] Surprisingly, the PETA *amici* at 11 admit that their tactics are "remarkably similar" to the predicate acts here. If they mean throwing paint on fur store patrons, sinking whaling ships or destroying lab equipment, these acts are unprotected. The fact that they picket or carry banners while committing violence does not immunize the violence. *See Claiborne*, 458 U.S. at 912. The AMA's brief at 2-4, 8, 22, also details violence against medical professionals that receives no First Amendment shield.

[31] Respondents suggest that the predicate acts are "non-violent speech." Yet the RICO Case Statement, JA-87-197, lists hundreds of acts where little or no protected speech is involved. While Migliorino claims that "most" of her conduct is protected, she conveniently ignores the acts listed in JA-118-126 -- forcible invasions, destruction of equipment and threats of physical force. PLAN's blockades, like its sit-ins, are forceful and violent.

terrorism, such conduct receives no protection.

B. Congress Has Resolved Respondents' Policy Arguments

By definition, "civil disobedience" is unlawful conduct. "Chilling" unlawful conduct is not a First Amendment issue.[32] Yet Respondents and PETA argue that even if the First Amendment does not protect it, this Court should reach out and exclude violent protest from RICO on policy grounds.

The *amicus* brief submitted in support of Petitioners by twenty-six civic and civil rights groups spanning religious, racial, ethnic, and other lines (the "Civic Groups") addresses the problem caused by the "worldwide resurgence of political, racial, religious, and ethnic terrorism" and points out the "very real possibility" that force and violence of this sort could be used against any of us. Civic Groups at 1, 6.[33] When a group -- for whatever reason -- conspires to use violence, there is no constitutional, legal or policy reason to encourage them.

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[32] *Wisconsin v. Mitchell*, 113 S.Ct. 2194, considered whether penalty-enhancements under hate-crimes laws chill protected expression and concluded that any such chill was attenuated, speculative and of no First Amendment concern. Any chill here, if there were one, would be of illegal conduct, not speech; there is even less cause for concern here than in *Wisconsin*. *See also Alexander*, 113 S.Ct. at 2171 (rejecting argument that forfeiture penalty chills protected speech).

[33] We need only pick up the daily paper to see the harm that terrorists, zealously believing in their cause, inflict on individuals, businesses and nations' economies. As this brief is being written, not only have two doctors who performed abortions been shot or killed, but the World Trade Center trial is underway; Salman Rushdie's publisher has been shot; it has been revealed that the lives of the people of Waco, Texas, "who did not say they were believers" were in jeopardy; and killings continue in Northern Ireland. True believers no doubt think that their ends justify their means and, to borrow Terry's phrase, that they need answer only to "higher laws." But when Respondents' *amici* call for "tolerance" of violence undertaken for a cause, they ask too much. (Ironically, those who ask for "tolerance" of their violence are typically wholehearted in their *intolerance* of those who follow different religious practices, hold different views or have a different opinion about what is best for the world.) Even the ACLU, at 17, an ardent supporter of dissent in many forms, recognizes the need for "a strong remedial response."

This Complaint is not brought to "crush" the anti-abortion movement, or "eliminate" opposing views, as Respondents say. Petitioners respect the peaceable speech of those who oppose their views. The Complaint seeks relief only from the terrorist tactics of a radical fringe that would deny doctors, women, business owners, and others the rights to practice medicine, make reproductive choices and engage in lawful business.[34] While tirelessly focusing on motive, Respondents refuse to draw a line between violent and non-violent conduct, but it is an essential distinction for determining RICO's application to their acts. RICO does not criminalize non-violent acts of protest that Respondents and their *amici* cite, such as teaching slaves to read, violating parade ordinances, burning draft cards, attempting to register to vote, chasing animals away from hunters, putting notes in pockets of fur coats, urging a consumer boycott or displaying signs without a permit. *See* 18 U.S.C. § 1961(1). Peaceful acts of protest, carried out without threats, cannot be predicate acts.[35] By contrast, threats and acts of violence may be RICO predicates. RICO's legislative history shows that its list of predicate acts was subject to intense First Amendment scrutiny.[36] While meeting First Amendment concerns, Congress

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[34] Respondents argue that applying RICO to non-economic enterprises or predicate acts will stifle "social dissent," but the ACLU at 3 correctly points out what a "poor proxy" economic motive is for protecting civil liberties. Although an opponent of RICO in general, the ACLU has never endorsed Respondents' view: "[T]he fact that defendants are motivated by politics rather than money is no more relevant than it would be if a group of white supremacists claimed a First Amendment right to intimidate blacks seeking to vote." *Id.* at 2-3.

[35] Civil disobedience functions by calling public attention to the justice of a cause, not by imposing the protester's will on others through threats and force. *See* PETA at 7-8. The acts of Dr. King (violating parade ordinance) and Dr. Benjamin Spock (burning draft cards) are far more effective in accomplishing social change than are PLAN's acts of terrorism. To a large degree, Respondents' methods have brought embarrassment, not positive public concern, to their movement. Yet, PLAN and the PETA *amici* insist on keeping the arrow of violence in their quiver.

[36] An early version of RICO would have rendered any act "creating danger of violence" a predicate act. *See* Scheidler at 33. Had that bill been enacted,

deliberately included forcible and violent conduct -- tactics used by both PLAN and organized crime -- as RICO predicates. Congress has the authority under the Constitution to decide which non-speech offenses to criminalize, and in RICO it struck a careful balance, leaving a broad margin around protected speech. Remanding this case will not chill speech; it will not even chill *non-violent* civil disobedience. It can only chill terrorism.

IV. CONCLUSION

The decision of the Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

Of Counsel:

Lowell E. Sachnoff
Jack L. Block
Sachnoff & Weaver, Ltd.
30 South Wacker Drive
Chicago, Illinois 60606

Alan M. Pollack
Mitchell G. Mandell
Scott A. Sommer
Pollack & Greene
757 Third Avenue
New York, New York 10017

Fay Clayton
Counsel of Record
Susan Valentine
Judi A. Lamble
Robinson Curley & Clayton, P.C.
300 South Wacker Drive
Chicago, Illinois 60606

Counsel for Petitioners

Dated: November 1, 1993.

RICO might have encompassed non-violent protest by "creat[ing] danger of violence" from the protesters' opponents. But in response to the ACLU's vigorous testimony, *e.g.*, 116 Cong. Rec. 35,212-14 (1970), Congress deleted this broad language from the bill.

(13)

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In the Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., ETC., ET AL., PETITIONERS

v.

JOSEPH SCHEIDLER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

MIGUEL A. ESTRADA
Assistant to the Solicitor General

CYNTHIA A. YOUNG
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether 18 U.S.C. 1962(c) and (d) require proof of economic motivation either in the racketeering enterprise or in the racketeering acts.

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, imposes criminal and civil liability for specified forms of racketeering activity. The United States brings both criminal prosecutions and civil actions under RICO. This case presents an issue that arises in both criminal and civil actions: Whether RICO requires proof that the racketeering enterprise or the acts of racketeering had a mercenary purpose. The court of appeals held that it does. If adopted by this Court, the court of appeals' restrictive construction of RICO

could impair the United States' ability to prosecute acts of terrorism and violence assertedly motivated by political or religious purposes. Accordingly, the United States has a significant interest in the Court's resolution of this case.

STATUTE INVOLVED

The pertinent provisions of RICO, 18 U.S.C. 1961 *et seq.*, are set forth in an appendix to this brief.

STATEMENT

1. Petitioners are a national non-profit organization that supports the legal availability of abortion, and two health centers that perform abortions. Respondents are several individuals and organizations that oppose abortion, and a medical laboratory that formerly provided services to the two petitioner health centers. Pet. App. A2-A3, B2-B3; *id.* at A4-A5.

In October 1986, petitioners sued respondents in the United States District Court for the Northern District of Illinois, alleging violations of the Sherman Act, 15 U.S.C. 1 *et seq.*, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(a), (c), and (d), as well as several pendent state-law claims. Petitioners sought injunctive relief, as well as treble damages, costs, and attorneys' fees. Following discovery, the complaint was amended twice in 1989. In March 1991, petitioners filed a "RICO Case Statement" that further detailed their allegations.[1]

[1] Pursuant to local rules, some district courts require RICO plaintiffs to submit a "RICO Case Statement" detailing, among other things, the enterprise, the pattern, the victims, and the participants involved. Those case statements are merely ex-

As amended, the complaint alleged that respondents were members of a nationwide conspiracy to shut down abortion clinics through a pattern of extortion. Petitioners alleged that respondents (other than respondent Vital-Med Laboratories, Inc.)[2] and their co-conspirators used force and threatened the use of force to induce doctors and clinic employees to give up their economic rights to employment, and to induce patients to give up their rights to medical services. Specifically, the complaint charged that respondents physically and verbally intimidated clinic personnel and patients; invaded clinics and damaged their equipment; blocked clinic entrances and exits; coordinated telephone campaigns to tie up clinic telephones; set up appointments under false pretenses to prevent legitimate patients from making appointments; established competing pregnancy testing and counseling facilities near the clinics; and interfered with the clinics' business relationships with landlords, patients, personnel, and medical laboratories. The RICO Case Statement further alleged that respondents and their co-conspirators engaged in bombings and numerous acts of arson and attempted arson to carry out the extortion scheme. With respect to

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tensions of the pleadings and thus may properly be (and routinely are) considered by courts in deciding motions under Fed. R. Civ. P. 12(b)(6). See *McLaughlin* v. *Anderson*, 962 F.2d 187, 189 (2d Cir. 1992); *Guidry* v. *Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992); *Glessner* v. *Kenny*, 952 F.2d 702, 712 n.9 (3d Cir. 1991); *Miranda* v. *Ponce Federal Bank*, 948 F.2d 41, 44 n.3 (1st Cir. 1991).

[2] As to respondent Vital-Med, petitioners alleged that it participated in the conspiracy by aiding numerous thefts of fetal remains from one of Vital-Med's laboratories during 1988. See Pet. App. A4-A5.

their substantive and conspiracy claims based on 18 U.S.C. 1962(c), petitioners alleged that the racketeering "enterprise" was respondent Pro-Life Action Network (PLAN), a coalition of anti-abortion groups. Pet. App. A2-A3 & n.5, A4; *id.* at B2-B3.

2. The district court dismissed the case pursuant to Rule 12(b)(6), Fed. R. Civ. P. The court first concluded that the Sherman Act does not apply when the activities complained of are "essentially political," and the parties are not "commercial competitors." Pet. App. B3-B8. The court next rejected petitioners' claim under 18 U.S.C. 1962(a), which generally proscribes investing racketeering income to acquire or maintain an interest in an enterprise, because the "income" alleged by petitioners consisted of voluntary donations from persons opposed to abortion, which "in no way were derived from the pattern of racketeering alleged in the complaint." Pet. App. B9.

The court then concluded that petitioners failed to state a claim under 18 U.S.C. 1962(c), which makes it unlawful to conduct the affairs of an enterprise through a pattern of racketeering activity. Relying on the Second Circuit's opinion in *United States* v. *Ivic*, 700 F.2d 51 (2d Cir. 1983), and its progeny, the court held that RICO embodies "an economic motive requirement * * * to the extent that some profit-generating purpose must be alleged in order to state a RICO claim [under Section 1962(c)]." Pet. App. B13. Because "the primary objective of the alleged enterprise and its pattern of predicate acts was to drive clinics that perform abortions out of business," and the predicate acts were not "crimes in which the necessary goal was to obtain money,"

id. at B15, the court concluded that petitioners failed "to allege the economic motivation requirement of RICO," *id.* at B16. In light of its dismissal of petitioners' claims under 18 U.S.C. 1962(a) and (c), the court also dismissed the claim that respondents conspired to violate those sections, in violation of 18 U.S.C. 1962(d). Pet. App. B16. Finally, the court declined to exercise jurisdiction over the pendent state-law claims because of its dismissal of all the federal claims. *Id.* at B16-B17.

3. The court of appeals affirmed. Pet. App. A1-A35. The court first held that the antitrust claim was properly dismissed, noting that respondents are not involved in business and have no ability to concentrate economic power. *Id.* at A15-A16. The court also agreed with the district court's conclusion that the voluntary contributions received by respondents from their supporters are not income "derived, directly or indirectly, from a pattern of racketeering activity," and accordingly that those contributions cannot support petitioners' claim under 18 U.S.C. 1962(a). Pet. App. A20-A24.

The court of appeals next turned to petitioners' claim that respondents conducted the affairs of PLAN through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c). The court agreed (Pet. App. A32-A33) with the Third Circuit's conclusion in *Northeast Women's Center, Inc.* v. *McMonagle*, 868 F.2d 1342 (3d Cir.), cert. denied, 493 U.S. 901 (1989), that conduct of the type alleged by petitioners constitutes extortion under the Hobbs Act, 18 U.S.C. 1951—a predicate crime under RICO. The court disagreed, however, with *McMonagle*'s conclusion that a pattern of such conduct is actionable

under RICO. Pet. App. A32-A33. Like the district court, the court of appeals elected to follow instead the Second Circuit's decision in *Ivic*, which held that an "economic motive" requirement is implicit in the "enterprise" element of the offense. The court therefore concluded that "non-economic crimes committed in furtherance of non-economic motives are not within the ambit of RICO." *Id.* at A32. Because it was "clear that the aim of the extortion[s] [was] to close women's health centers" rather than to raise funds, and because the economic effect of respondent's conduct did not establish the "economic motive required by *Ivic* and its progeny," the court concluded that petitioners failed to state a claim under 18 U.S.C. 1962(c). Pet. App. A33-A34. In light of its conclusions concerning petitioners' substantive RICO claims, the court also affirmed the dismissal of the conspiracy claim under 18 U.S.C. 1962(d). Pet. App. A34.

SUMMARY OF ARGUMENT

A. The issue in this case is whether Sections 1962(c) and (d) of RICO require proof of economic motivation either in the racketeering enterprise or in the racketeering acts. Section 1962(c) broadly declares that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." Section 1962(d) proscribes conspiracies to violate Section 1962(c).

The court of appeals believed that proof of an economic motive is required by the "enterprise" ele-

ment of RICO, the meaning of which the court derived from the context in which the term is used in Sections 1962(a) and (b). That analysis is erroneous in several respects. Congress did not leave the meaning of "enterprise" to interpretation, but specifically defined it in terms that do not restrict it to organizations with an economic purpose. Moreover, even if Sections 1962(a) and (b) apply only to business enterprises, it does not follow that entities that cannot violate those two sections are thereby immunized from the reach of Sections 1962(c) and (d). As this Court has recognized, the inapplicability of the full range of statutory provisions to an entity does not imply that the entity can *never* be a RICO "enterprise." *United States* v. *Turkette*, 452 U.S. 576, 587 (1981). The implausibility of the court of appeals' statutory analysis is demonstrated by the fact that the court of appeals and the cases on which it relied all hold that the "enterprise" need not have an economic purpose at all if the racketeering acts are motivated by such a purpose.

The court of appeals relied on the legislative history of RICO, which reflects that a principal concern of Congress was the evil of organized crime, and also adverted approvingly to other courts' reliance on 1981 guidelines promulgated by the Department of Justice for use by prosecutors in RICO cases. Neither supports the conclusion reached by the court of appeals. First, this Court has often emphasized that the scope of a statute is not limited to the applications explicitly mentioned in its legislative history. The Court accordingly has refused to limit RICO to organized crime, noting that "Congress for cogent reasons chose to enact a more general statute, one

which, although it had organized crime as its focus, was not limited in application to organized crime." *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 248 (1989). Second, the internal guidelines to which the court of appeals adverted have long been superseded and are, in any event, irrelevant. Guidelines promulgated by the Justice Department to guide the exercise of prosecutorial discretion do not represent a construction of RICO that is entitled to deference by courts under principles of administrative law.

The "economic motive" requirement endorsed by the court of appeals also poses serious definitional problems. A political or religious organization engaging in a pattern of unlawful acts may do so principally for non-economic reasons, but the organization may nonetheless derive some incidental economic benefits from those acts. The court of appeals' analysis leaves it entirely unclear how much economic benefit would be enough to convert "political" or "religious" conduct into "economic" conduct falling within the ambit of RICO. Whether acts of extortion or arson are motivated by a long-term political or religious purpose, or whether that purpose is being claimed in a given case as a convenient pretext for more mundane criminal aims, is a difficult question to resolve. It is also a question that is irrelevant to the policies of RICO, since the economic and societal effects of a pattern of arson, extortion, or other racketeering acts are the same irrespective of the motives of those involved.

B. The courts below rested their decision to dismiss solely on their incorrect conclusion that RICO requires proof that the defendant was motivated by an "economic purpose." Those courts have had no

opportunity to assess respondents' motion to dismiss under the correct legal standards. Under the correct legal standards, it is clear that petitioners have properly alleged each element of a RICO violation under 18 U.S.C. 1962(c) and (d), and that the courts below therefore erred in dismissing their claims.

ARGUMENT

RICO DOES NOT REQUIRE THAT A DEFENDANT BE MOTIVATED BY AN ECONOMIC PURPOSE IN ORDER TO BE HELD LIABLE UNDER 18 U.S.C. 1962(c) AND (d)

This case presents the question whether RICO requires proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose. Following the Second Circuit's lead in *United States* v. *Ivic*, 700 F.2d 51 (2d Cir. 1983), and with no independent analysis of their own, the Seventh and Eighth Circuits have concluded that the "enterprise" element of RICO requires proof of such an economic motivation. See *National Organization for Women, Inc.* v. *Scheidler*, 968 F.2d 612, 625-630 (7th Cir. 1992) (decision below); *United States* v. *Flynn*, 852 F.2d 1045, 1052 (8th Cir.), cert. denied, 488 U.S. 974 (1988). Those decisions conflict with the result reached by the Third Circuit in *Northeast Women's Center, Inc.* v. *McMonagle*, 868 F.2d 1342 (3d Cir.), cert. denied, 493 U.S. 901 (1989). See also *United States* v. *Webster*, 669 F.2d 185, 186-187 (4th Cir.) (enterprise need not be organized for profit) (dictum), cert. denied, 456 U.S. 935 (1982). For the reasons that follow, this Court should conclude that RICO imposes no "economic motivation" requirement.

A. The Language And Purposes Of RICO Are Inconsistent With A Requirement That The Defendant Be Motivated By An Economic Purpose

1. In construing RICO, this Court has consistently emphasized that the statutory language "must ordinarily be regarded as conclusive." *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). See also *Reves* v. *Ernst & Young*, 113 S. Ct. 1163, 1169 (1993). That principle governs this case. Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise * * * to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." Nothing in that broad proscription suggests a congressional design to reach only conduct involving economic motivations, goals, or purposes.

Thus, the phrase "racketeering activity" means conduct that is "chargeable" or "indictable" under a wide range of state and federal laws, including predominantly non-economic crimes such as murder, arson, and obstruction of justice, 18 U.S.C. 1961(1). The "enterprise" element, in which the court of appeals purported to find an "economic motive" limitation, is no less broad. Section 1961(4) provides that " 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." That definition, which uses the words "any" and "includes"—as distinct from the word "means" used in other RICO definitions, see, *e.g.*, 18 U.S.C. 1961(6)—is not susceptible to a narrow and grudging interpretation. Nor is there any suggestion in that definition that it is restricted to organizations having a mercenary purpose.

In *United States* v. *Turkette*, this Court noted that "[t]here is no restriction upon the associations embraced by the definition [of enterprise]"; the Court there rejected the claim that the term should be confined to "legitimate" organizations—a claim that parallels the claim made here, that the term should be confined to organizations with an economic purpose. 452 U.S. at 580.[3]

2. In narrowing the scope of the statutory language, the court of appeals relied principally (Pet. App. A28-A30) on the statutory analysis of *Ivic*. In that case, the Second Circuit reversed the Section 1962(c) convictions of Croatian nationalists who had plotted to "use terror, assassination, bombings, and violence," *United States* v. *Ivic*, 700 F.2d at 58, to further the political cause of Croatian independence. The Second Circuit noted that the term "enterprise" is used in Sections 1962(a) and (b), which prohibit (1) using racketeering income to acquire an interest in an enterprise, or to establish or operate an enterprise, and (2) maintaining an interest in or control of an enterprise through a pattern of racketeering activity or collection of an unlawful debt. As used in those sections, the Second Circuit explained, the term "quite clearly refers to the sort of entity in which funds can be invested and a property interest

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[3] This is not to suggest that economic factors are entirely irrelevant to RICO. All of the RICO prohibitions require that the enterprise be engaged in or that its activities affect interstate or foreign commerce. See 18 U.S.C. 1962(a), (b), and (c). In addition, RICO requires that a civil plaintiff show that he has been "injured in his business or property" by the conduct constituting the RICO violation. 18 U.S.C. 1964(c). Respondents do not suggest that petitioners cannot meet those modest requirements.

of some sort acquired, and hence the sort of entity which one joins to make money." *United States* v. *Ivic*, 700 F.2d at 60-61. The *Ivic* court therefore concluded that a parallel limitation must be read into Section 1962(c).

We believe the Second Circuit's statutory analysis misses the mark for several reasons. First, because the term "enterprise" is defined by RICO, the *Ivic* court erred in seeking its meaning from the various contexts in which the term is used in the statute, rather than simply applying the broad definition enacted by Congress.

Second, the Second Circuit erred in concluding that, as used in Sections 1962(a) and (b), the term "enterprise" refers solely to an entity in which funds can be invested or a property "interest" of some sort can be acquired. That conclusion ignores the fact that those sections also outlaw using racketeering funds in the "operation" of any enterprise, 18 U.S.C. 1962(a), as well as maintaining "control" of an enterprise through racketeering, 18 U.S.C. 1962(b). An enterprise can be "operat[ed]" or "controll[ed]" within the meaning of Sections 1962(a) and (b) even if it is not an entity in which funds can be invested or a property interest acquired. The Second Circuit's construction of the term "enterprise" also ignores the holding of *Turkette*, since the illegitimate associations *Turkette* found to be statutory "enterprises" will rarely if ever be the types of entities in which formal investments can be made, or in which traditional property interests can be acquired. See *Russello* v. *United States*, 464 U.S. 16, 24 (1983). And it is inconsistent with the analysis in *Russello* v. *United States*, which recognized that Congress used the broad term "interest," rather than a more re-

strictive term, "because [it] did not wish * * * to be limited by rigid and technical definitions drawn from other areas of the law." 464 U.S. at 21.

Third, even if the *Ivic* court were correct in concluding that Sections 1962(a) and (b) contemplate only enterprises in which funds can be invested or in which formal property interests can be acquired, it does not follow that entities that cannot violate those two sections must be removed entirely from the reach of other sections of the statute. The inapplicability of the full range of statutory provisions to an entity does not imply that the entity can *never* be a RICO "enterprise." See *United States* v. *Turkette*, 452 U.S. at 585 ("Even if one or more of the civil remedies might be inapplicable to a particular illegitimate enterprise, this fact would not serve to limit the enterprise concept").[4]

Nor does the *Ivic* court's conclusion follow from its premise. Even if Sections 1962(a) and (b) apply

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[4] *Ivic*'s gloss on the "enterprise" element, if widely followed, would significantly contract the scope of RICO, eliminating from its reach government agencies, courts, non-profit organizations, and other non-economic entities that the lower courts have consistently held to fall within the statutory definition. See, *e.g.*, *United States* v. *Hocking*, 860 F.2d 769, 778 (7th Cir. 1988) (Illinois Department of Transportation); *United States* v. *Yonan*, 800 F.2d 164, 167-168 (7th Cir. 1986) (Cook County State's Attorney's Office), cert. denied, 479 U.S. 1055 (1987); *United States* v. *De Peri*, 778 F.2d 963, 974 (3d Cir. 1985) (Philadelphia Police Department), cert. denied, 475 U.S. 1110 (1986); *United States* v. *Ferguson*, 758 F.2d 843, 853 (2d Cir.) (Black Liberation Army), cert. denied, 474 U.S. 1032 (1985); *United States* v. *Qaoud*, 777 F.2d 1105, 1116 (6th Cir. 1985) (office of Michigan District Court), cert. denied, 475 U.S. 1098 (1986); *United States* v. *Clark*, 646 F.2d 1259, 1263 (8th Cir. 1981) (office of county judge).

only to entities in which funds may be invested or in which an interest may be acquired, that does not mean that the entities covered by Sections 1962(a) and (b) necessarily have the making of money as their purpose. Not-for-profit organizations are not inherently incapable of receiving racketeering proceeds, nor are they necessarily less susceptible to any of the other abuses RICO sought to prevent.

The insubstantiality of the textual basis proffered by *Ivic* (and endorsed by the court of appeals in this case) for any "economic motive" requirement is revealed by the fact that *Ivic*, the Second Circuit's cases following *Ivic*, and the court of appeals' opinion in this case all hold that the "enterprise" need not be shown to have an economic purpose after all—as long as the predicate acts are motivated by such a purpose. See *United States* v. *Bagaric*, 706 F.2d 42, 56-57 (2d Cir.) (enterprise composed of terrorists who sought Croatian independence, and who murdered those who failed to comply with extortion letters designed to raise money for that cause), cert. denied, 464 U.S. 840 (1983); *United States* v. *Ivic*, 700 F.2d at 65; Pet. App. A31. That the requisite economic motive or purpose may be found in the racketeering acts, even when the enterprise is shown to have a primarily "political" purpose, belies any claim that the term "enterprise" incorporates the requirement adopted by the court of appeals.

3. The *Ivic* court and the court of appeals in this case also relied on the legislative history of RICO, which shows that a principal concern of RICO's drafters was "the infiltration of organized crime into legitimate business." Pet. App. A28; *United States* v. *Ivic*, 700 F.2d at 63. While the court of appeals conceded that Congress's concerns extended beyond

the infiltration of legitimate businesses by organized crime, it appeared to place some weight on the fact that "political terrorist organizations do not generate funds that could allow them to infiltrate legitimate business," Pet. App. A28-A29, as indicating that Congress's concerns "may not have" extended to the conduct "of political terrorists." *Id.* at A29.

The short answer to that assertion is that it is not the discussion of anticipated applications in the legislative history that defines the scope of a statute, but rather the language actually enacted by Congress. See *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 495-496 n.13 (1985). As this Court has repeatedly emphasized, "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988). See also *Moskal* v. *United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history"). Because the statutory language does not encompass the limitation supposed by the court of appeals, the failure of the legislative history specifically to advert to the application of RICO urged by petitioners cannot be used to create an exception not otherwise found in the statute.[5]

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[5] The court of appeals' reliance on the reference in the legislative history to the infiltration of organized crime into legitimate businesses recalls the argument that was raised and rejected in *United States* v. *Turkette, supra.* There, the Court held that RICO was not meant to be restricted to combatting the infiltration of organized crime into legitimate businesses, but was meant to reach "the activities of enterprises organized and existing for criminal purposes." 452 U.S. at 591. Since its decision in *Turkette*, the Court has repeatedly re-

In any event, to the extent the legislative history speaks to the issue at all, it undermines the conclusion reached by the court of appeals. As originally proposed, the Organized Crime Control Act of 1970 did not contain a RICO provision. See S. 30, 91st Cong., 1st Sess. (1969), *reprinted in* 115 Cong. Rec. 829-832 (1969). Two bills were later introduced to correct that failing: S. 1623 ("The Criminal Activities Profits Act") and S. 1861 ("The Corrupt Organizations Act of 1969"). See S. 1623, 91st Cong., 1st Sess. (1969), *reprinted in* 115 Cong. Rec. 6995-6996 (1969); S. 1861, 91st Cong. 1st Sess. (1969), *reprinted in* 115 Cong. Rec. 9568-9571 (1969). See also S. Rep. No. 617, 91st Cong., 1st Sess. 83 (1969). Those two bills were consolidated as the RICO title (Title IX) of the Organized Crime Control Act. See 116 Cong. Rec. 584 (1970) (introduction of amended bill); *id.* at 591 (remarks of Sen. McClellan); *id.* at 35,197 (remarks of Rep. McCulloch). See generally *Reves* v. *Ernst & Young*, 113 S. Ct. at 1170-1171.

The definition of "enterprise" in S. 1861 was identical to that enacted in 18 U.S.C. 1961(4). The competing provision of S. 1623, on the other hand, was more narrowly limited to the investment of racketeering income in "any business enterprise," rather than

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jected the claim that RICO should be confined to cases raising the specter of organized crime's infiltration into legitimate businesses. See *H.J. Inc.* v. *Northwestern Bell Telephone*, 492 U.S. 229, 245-249 (1989); *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. at 493-500. As the Court explained in *H.J. Inc.*, "[t]he occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." 492 U.S. at 248.

simply in an "enterprise." See 115 Cong. Rec. 6995 (1969); S. 1623, 91st Cong., 1st Sess. § 2 (1969). Thus, while S. 1623 apparently contemplated that only enterprises engaged in "business" would come within the reach of the statute, Congress deliberately eschewed that approach when it adopted the broader language of S. 1861—that " 'enterprise' includes any * * * group of individuals associated in fact." 115 Cong. Rec. 9569 (1969). Where, as here, Congress "includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello* v. *United States*, 464 U.S. at 23-24. Thus, far from supporting the narrow construction adopted by the court of appeals, the legislative history of RICO indicates that Congress considered and rejected such a limitation.

4. The court of appeals also adverted to, and appeared to find persuasive, *Ivic*'s reliance on guidelines for RICO prosecutions issued by the Department of Justice in 1981, which the *Ivic* court believed were entitled to deference under administrative law principles. See 700 F.2d at 64. The guideline on which *Ivic* relied was superseded in 1984 to provide, contrary to the court's position in *Ivic*, that an association-in-fact enterprise must be "directed toward an economic *or other identifiable goal*." U.S. Attorney's Manual § 9-110.360 (Mar. 9, 1984) (emphasis added).

The *Ivic* court erred in relying on the Department of Justice's RICO guidelines to reach its conclusion. To begin with, it is open to question whether the Department's construction of a criminal statute is entitled to administrative deference. See *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J.,

concurring in judgment). In any event, when such deference is appropriate, an agency's interpretation of the law may be used only to clarify statutory ambiguities; deference does not come into play unless the statute in question is ambiguous. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 447-448 (1987). In light of the breadth of RICO's language, there can be no claim that the statute is ambiguous with respect to the issue presented here. Finally, the United States Attorney's Manual is not intended to incorporate the Department's view of what the law is, but merely to provide internal guidance on the exercise of prosecutorial discretion. Because of that focus, the Manual expressly notes that it is "not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." U.S. Attorney's Manual § 1-1.100 (Oct. 1, 1988). See *United States* v. *Carson*, 969 F.2d 1480, 1495 n.8 (3d Cir. 1992); *United States* v. *Senibaldi*, 959 F.2d 1131, 1136 (1st Cir. 1992). The Department's decision, at some point in the past, not to focus its enforcement efforts on noneconomic enterprises thus does not suggest that the statute should be read to exclude such enterprises from its reach.[6]

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[6] Indeed, the cases in which this Court has declined to restrict the scope of RICO to activities typical of organized crime involved applications of the statute that Department of Justice prosecutors would not have pursued under the internal RICO guidelines then in force. *Sedima* involved a garden-variety commercial dispute affecting only two parties and in which the RICO claims were predicated simply on the commission of mail and wire fraud—facts that would not ordinarily have warranted a federal criminal prosecution under the then-applicable guidelines. See *Sedima, S.P.R.L.* v. *Imrex*

5. In addition to lacking a foundation in the statutory language, the legislative history, or any applicable canon of statutory construction, the "economic motive" requirement endorsed by the court of appeals poses serious definitional problems that bear little, if any, relation to the policies of RICO. Among those problems are the extent to which a financial purpose must be present before the court of appeals' "economic motive" requirement is satisfied, and whether the "economic motive" must have caused either the formation of the enterprise or the commission of one or more of the predicate crimes. An organization engaging in a pattern of unlawful acts may do so principally for political or religious reasons, but the acts may have some incidental economic benefits for the organization—such as increasing contributions from members and supporters. See *United States* v. *Ellison*, 793 F.2d 942, 945, 950 (8th Cir.) (white supremacist group's arson "produce[d] operating funds" and "bolster[ed] * * * members' morale and commitment to [the group]"), cert. denied, 479 U.S. 937 (1986). The court of appeals' analysis leaves it entirely unclear how much economic

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Co., 473 U.S. at 502-503 (Marshall, J., dissenting). And in *H.J. Inc.* the Court rejected the claim that the "pattern" element of the statute requires a showing that the predicate acts of racketeering were committed in furtherance of multiple criminal "schemes," and went on to hold "[that Congress] envision[ed] a concept of sufficient breadth that it might encompass multiple predicates within a single scheme." *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. at 237. In our brief as *amicus curiae* in *H.J. Inc.*, we advised the Court that "as a matter of prosecutorial discretion" the Department of Justice followed "a general policy against charging multiple predicate acts based on a single episode of criminal conduct." See 87-1252 Brief for the United States as Amicus Curiae Supporting Petitioners at 12-13 n.6.

benefit would be enough to convert "political" or "religious" conduct falling outside RICO into "economic" conduct falling within the statute's reach.

Moreover, the inquiry required by the court of appeals conflicts with the longstanding principle that motive and purpose, while sometimes relevant evidence, are not generally elements of crimes. Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 927-928 (3d ed. 1982). See also *United States* v. *Pomponio*, 429 U.S. 10, 12-13 (1976); *United States* v. *Malinowski*, 472 F.2d 850, 855-856 (3d Cir.), cert. denied, 411 U.S. 970 (1973); *United States* v. *Cullen*, 454 F.2d 386, 390-392 (7th Cir. 1971) (Stevens, J.); *United States* v. *Moylan*, 417 F.2d 1002, 1004 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970). Whether acts of extortion or arson are motivated by a long-term political or religious purpose, or whether that purpose is being claimed in a given case as a conscious charade or subconscious pretense for more mundane criminal aims, is a difficult question to resolve, and it is irrelevant to the traditional concerns of the criminal law. It is also irrelevant to the policies of RICO, since the effects of a pattern of arson or extortion are the same regardless of the motives of those involved.

After confronting those questions in cases following *Ivic*, the Second Circuit has disavowed any inquiry into "long-term pecuniary objectives which in some sense can be said to supersede accompanying political or religious ones." *United States* v. *Bagaric*, 706 F.2d at 54-55. The Second Circuit, however, has continued to adhere to the vague formulation that "*some* financial purpose" is required by RICO. *United States* v. *Ferguson*, 758 F.2d at 853. That amorphous requirement is incapable of principled administration

by the courts or the government, and it finds no support in the statutory text. It should accordingly be rejected.

B. The Courts Below Rested Their Decision To Dismiss Solely On Their Incorrect Understanding Of RICO

The courts below rested their decision to dismiss solely on their incorrect conclusion that RICO requires proof of an "economic motive" on the part of the defendant. Those courts have had no opportunity to assess respondents' motion to dismiss under the correct legal standards, untainted by their erroneous views of RICO. Applying the correct legal standards, the judgment dismissing the complaint should be reversed.

Because respondents obtained the dismissal on a motion under Federal Rule of Civil Procedure 12(b)(6), this Court must construe the facts alleged in the complaint and the RICO Case Statement in the light most favorable to petitioners. *H.J. Inc* v. *Northwestern Bell Telephone Co.*, 492 U.S. at 249. And the Court may only affirm the dismissal of petitioners' complaint if it is "beyond doubt" that petitioners "can prove no set of facts" entitling them to relief, *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); that is, only "if 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. at 249-250.

Petitioners' complaint and RICO Case Statement allege that respondents and their co-conspirators engaged in a "pattern" of extortion, which they committed through numerous other crimes, including "bombings," "arson," "threats to clinic employees," and "harassment of patients and staff." RICO Case

Statement at 10. Arson, threats of arson, and extortion are all predicate crimes under RICO. See 18 U.S.C. 1961(1)(A) and (1)(B). Petitioners have also alleged that PLAN, an interstate coalition of anti-abortion groups and individuals whose "objective is to close clinics that perform abortions through the commission of extortionate acts" (RICO Case Statement at 13), is the "enterprise." PLAN unquestionably is a "union or group of individuals associated in fact" and therefore it may properly constitute an "enterprise" under RICO. See 18 U.S.C. 1961(4). No more is required to establish respondents' liability under RICO. See *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. at 496-497. Under the statutory analysis set forth above, and consistent with the allegations of petitioners' pleadings, it is most assuredly not "beyond doubt" that petitioners can prove no set of facts entitling them to relief under RICO.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

MIGUEL A. ESTRADA
Assistant to the Solicitor General

CYNTHIA A. YOUNG
Attorney

AUGUST 1993

APPENDIX

18 U.S.C. 1961 provides:

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tamper-

ing with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offence involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs,

punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a

thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. 1962 provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. 1964 provides:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

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No. 92-780

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

NATIONAL ORGANIZATION FOR WOMEN, INC.

PETITIONER

v.

JOSEPH M. SCHEIDLER

RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

ALAN ERNEST
COUNSEL FOR MOVANT

P.O. BOX 4041
RIO RICO, AZ 85648
(602) 281 - 7513

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MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

The Court is moved to allow Alan Ernest to represent the victims being killed by Roe v. Wade, 410 U.S. 113, as counsel or guardian ad litem, for the purpose of defending their right to life under the U.S. Constitution.

INTEREST OF COUNSEL

Alan Ernest is a member of the bar of this Court and his two decades of work for the unborn is well known to this Court. His purpose is to prove that the guarantee of life to "any person," as made in the U.S. Constitution, does include the unborn.

This is effectively a motion to allow retained counsel since there will be no expense to this Court or to the taxpayers.

SUMMARY OF ARGUMENT

The unborn have a constitutional right to be represented by counsel to prove that the Constitution's universal guarantee of life to "any person" does include the unborn.

Argument

THE UNBORN HAVE A CONSTITUTIONAL RIGHT TO BE ESPECIALLY REPRESENTED BY COUNSEL TO DEFEND THEIR RIGHT TO LIFE UNDER THE CONSTITUTION.

1.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW COUNSEL TO REPRESENT THE UNBORN AND DEFEND THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.

Counsel did not especially represent the unborn in the U.S. District Court, or at any stage in Roe v. Wade. An original party objected that the unborn should be represented by counsel in this Court:

> (T)he Court should have every benefit of a complete record and the representation of a guardian ad litem for that fetal entity and for its natural right to develop to birth.[1]

But this Court refused to allow counsel to represent the unborn and defend their right to life under the U.S. Constitution. Thus the killings commenced.

And the Supreme Court has maintained the killings by steadfastly refusing to allow

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1. Petition for Rehearing 5, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959.

counsel to represent the unborn, and defend their right to life under the Constitution.[2]

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2. Colautti v. Franklin, 439 U.S. 379, motion to allow counsel for the unborn denied 437 U.S. 902; Anders v. Floyd, 440 U.S. 445, motion to allow counsel for the unborn denied 439 U.S. 890; Bellotti v. Baird, 443 U.S. 622, motion to allow counsel for the unborn denied 439 U.S. 1065; Ashcroft v. Freiman, affirmed 440 U.S. 941, motion to allow counsel for the unborn denied 440 U.S. 941; United States v. Zbaraz, 448 U.S. 358, motion to allow counsel for the unborn denied 444 U.S. 1030; Harris v. McRae, 448 U.S. 297, motion to allow counsel for the unborn denied 445 U.S. 941; H.L. v. Matheson, 450 U.S. 398, motion to allow counsel for the unborn denied 445 U.S. 959; Simopoulos v. Virginia, 462 U.S. 506, motion to allow counsel for the unborn denied 458 U.S. 1104; Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476 motion to allow counsel for the unborn denied 458 U.S. 1104; Akron Center for Reproductive Health v. Akron, 462 U.S. 416, motion to allow counsel for the unborn denied 458 U.S. 1104; Diamond v. Charles, 476 U.S. 54, motion to allow counsel for the unborn denied 473 U.S. 932; Thornburgh v. American College of Obstetricians, 476 U.S. 747, motion to allow counsel for the unborn denied 473 U.S. 931; Hartigan v. Zbaraz, 484 U.S. 171, motion to allow counsel for the unborn denied 479 US 1003; Webster v. Reproductive Health Services 492 U.S. 490, motion to allow counsel for the unborn denied 489 U.S. 106; Ohio v. Akron Center for Reproductive Health, 497 US 502, motion to allow counsel for the unborn denied 493 U.S. 802; Hodgson v. Minnesota, 497 US 417, motion to allow counsel for the unborn denied 492 U.S. 803; New York v. Sullivan, 114 L Ed 2d 233, motion to allow counsel for the unborn denied 111 L Ed 2d 746; Planned Parenthood of Southeastern Pennsylvania v.

The unborn have a constitutional right to be represented by counsel in this case to defend their right to life under the U.S. Constitution.[3] Judges who willfully deny

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Casey, 120 L Ed 2d 674, motion to allow counsel for the unborn denied 117 L Ed 2d 614.

3. Even in civil proceedings, where crucial deprivations are threatened, such as loss of welfare, due process guarantees (1) prior notice of the factual and legal bases; (2) the right to be represented by counsel; (3) the right to confront and cross-examine adverse evidence; (4) the right to present evidence. Goldberg v. Kelly, 397 U.S. 254, 268-271 (1970). See also, In Re Gault, 387 U.S. 1 (1967).

Could it be possible that procedures, which could not be used to deprive a mother of welfare, could be used to exclude her from the protection of the U.S.Constitution so that she could be killed with impunity from criminal laws? This is preposterous.

The Constitution would not permit any court to condemn even one single Jew to death in a criminal case, but deny any of these procedural rights. Then neither can it permit any court to condemn all Jews in the United States to death, but deny any of these procedural rights, by calling it a civil proceeding, and decreeing the lives of all Jews are not protected by the U.S. Constitution, and it is "liberty" to kill all Jews with impunity from criminal laws.

Any victim is entitled to all these procedural protections before any court can decree that the victim's life is not protected by the Constitution, and the victim can be killed with impunity from criminal statutes. The rule for one is the rule for

this right are guilty of crime.[4] This denial makes Roe v. Wade void.

2.

THIS COURT EFFECTED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW PRIOR NOTICE OF THE CONSTITUTIONAL STANDARDS, THE BURDENS OF PROOF, OR THE EVIDENCE WHICH IT USED TO INFER THAT THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION.

The District Court in Roe v. Wade did not even look to see if the lives of the unborn were protected by the Constitution. This question was argued for the first time after the case reached this Court. Since this Court had never previously excluded anyone from the protection of the U.S. Constitution so they could be killed with impunity from criminal statutes, the parties had no prior notice of the factual and legal bases for such an exclusion.

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all; these are the sacred truth-seeking procedures which protect the lives of all Americans.

4. "Even judges ... could be punished criminally for willful deprivations of constitutional rights." Imbler v. Pachtman, 424 U.S. 409 (1976).

Moreover in the aftermath of Dred Scott v. Sanford, legitimate public expectation rested on the assurance that this Court would never again attempt another exception to the universal terms "any person."[5]

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5. This Court's decision in Dred Scott v. Sanford appears to be the only precedent in American history in which this Court has implied an exception to the universal terms "any person" in the Fifth or Fourteenth Amendments. The Court there ruled that the universal words "any person" did not include Negroes, there was a constitutional right to own a slave, and Congress could not prohibit slavery in the free territories. This decision triggered a civil war. Candidate Abraham Lincoln vowed he would not obey Dred Scott. Opponents said their states would withdraw from the Union rather than be deprived of their assumed constitutional right to own slaves and take them to the free territories. 4 Collected Works of Abraham Lincoln 267 (1953). But President Abraham Lincoln responded that if he were bound by Dred Scott, "the people will have ceased to be their own rulers." Id., at 268. Thus the war commenced.

A purpose of the Fourteenth Amendment was to overrule Dred Scott, and place it beyond the power of judges to ever again produce convulsions by implying an exception the universal words "any person." For over a century legitimate public expectation rested on the assurance that this Court would never again attempt an exception to the universal terms "any person."

But without any prior notice, this Court once again, in the precise manner of Dred Scott, attempted to imply an exception to the universal words "any person." In Roe v. Wade, this Court thus combined both total surprise and violent defiance of the long standing legitimate public expectation that this Court would never again defy the universal words "any person."

In particular, this Court gave the parties in Roe v. Wade no prior notice of the constitutional standards, the burdens of proof, or the evidence, which the Court used to infer that the guarantee of life to "any person," as used in the Fourteenth Amendment, did not include the unborn.

The first time the parties had notice was when Roe v. Wade was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn.

> (N)ot only did the Court set a new constitutional standard, but at the same moment the Court applied the standard

> without giving the Appellees notice or opportunity to present evidence with respect to the point in gestation at which such standards, if they be correct as a matter of law in the first place, should be applied. "Viability", "meaningful life" or existence, "fetal life": all presumably have medical meaning which should be subject to medical testimony before a decision of constitutional import becomes solidified in concrete. These concepts are not even necessarily the appropriate ones.[6]

But this Court refused to allow the original parties to have prior notice. Thus the killings commenced.

And this Court has maintained the killings despite repeated objections that the unborn had no prior notice in Roe v. Wade of the factual and legal basis needed to defend the unborn's right to life under the U.S. Constitution.[7]

The unborn have a constitutional right to prior notice of all the factual and legal bases before they can be excluded from the

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6. Petition for Rehearing 6, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973). (emphasis added).

7. See cases in note 2, supra.

protection of the Constitution so they can be killed with impunity from criminal statutes.[8] Judges who willfully deny this right are guilty of crime.[9] This denial makes Roe v. Wade void.

3.

THIS COURT EFFECTED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY USING A SECRET EVIDENTIARY PROCESS TO FIND EVIDENCE TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION.

This Court used some secret evidentiary process, not open to the parties, to find evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. The Court conducted these evidentiary proceedings in its back rooms; the parties were not allowed to be present; no public record was made of these proceedings. The purpose of these proceedings was to find evidence to infer that the lives of the unborn were not protected by the U.S.

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8. See note 3, supra.

9. See note 4, supra.

Constitution. An original party objected to these secret judicial proceedings:

> The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation for the Court's opinion ... of constitutional stages of fetal growth.[10]

But the Court permitted the killings to commence despite this objection to its secret evidentiary proceedings.

And this Court has maintained the killings despite repeated objections that it used secret evidentiary proceeding in Roe v. Wade.[11]

The unborn have a constitutional right not to be excluded from the protection of the U.S. Constitution by secret evidentiary

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10. Petition for Rehearing 4, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

11. See cases in note 2, supra.

proceedings.[12] Judges who willfully deny this right are guilty of crime.[13] This denial makes Roe v. Wade void.

4.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW ITS EVIDENCE, WHICH IT USED TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION, TO BE CONFRONTED AND CROSS-EXAMINED.

Since the Court used a secret process, the original parties had not seen all the evidence which the Court used to infer that the lives of the unborn are not protected by the U.S. Constitution. An original party asked permission to cross-examine the evidence which the Court used to infer that the lives of the unborn were not protected by the U.S. Constitution:

> The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless

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12. See note 3, supra.

13. See note 4, supra.

> should be subject to refutation and counter-evidence since they form the foundation of the Court's opinion ... of constitutional stages of fetal growth.[14]

But the Supreme Court refused to allow the original parties to cross-examine its evidence in Roe v. Wade, which it used to infer that the lives of the unborn were not protected by the U.S. Constitution. Thus the killings commenced.

And this Court has maintained the killings by steadfastly refusing to allow its evidence, which it used to infer that the lives of the unborn were not protected by the U.S. Constitution, to be confronted and cross-examined.[15]

The unborn have a constitutional right to confront and cross-examine the evidence which this Court used to infer that their lives are not protected by the U.S.

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14. Petition for Rehearing 4, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973) (emphasis added).

15. See cases in note 2, supra.

Constitution.[16] Judges who willfully deny this right are guilty of crime.[17] This denial makes Roe v. Wade void.

5.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW EVIDENCE TO BE PRESENTED ON BEHALF OF THE UNBORN TO PROVE THE CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

In Roe v. Wade, the Court invented new constitutional standards on the protection of life by the U.S. Constitution, which the parties did not see until after Roe v. Wade was decided. The parties never had any opportunity to present evidence under these new standards. An original party asked permission to present evidence under the new constitutional standards, which it had not seen before, to show that the lives of the unborn are protected by the U.S. Constitution:

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16. See note 3, supra.

17. See note 4, supra.

We are dealing here with a procedure long considered outlawed and which has suddenly become become legal.

....

The Court has selected a point in time at which states may protect fetal life, without any record of facts upon which to base the conclusion that only at "viability," as that term is defined by the Court, do the people of a state have authority to demand caution before a prenatal infant is destroyed.

....

Appellees have had no opportunity to show by evidence in a traditional judicial trial setting at what gestational stage the separate life of the fetus is "meaningful" medically; in addition, the Court overlooked the significance of Georgia's legal recognition of meaningful human life as found in case law and statute.

....

With no opportunity for Appellees to demonstrate the factual basis, in terms of current medical science, that its interest attaches at a particular point in the natural development of a human fetus, the Court has seized upon the convenient point of "viability" and crystallized constitutional command which bars State action.

....

In the medical concept of "life," with its current body of technological knowledge, including such advances as fetal electrocardiography and fetal electroencephalography, legal "life" should not be cemented at an event in a judicial conclusion which does not have the benefit of medical evidence.

....

At any rate, Appellees should have an opportunity to present evidence and testimony to support the State's claim

> of medically and scientifically sound interest in requiring a cautious approach to the extinguishment of fetal life.[18]

But the Court refused to allow the original parties to present evidence to show that the lives of the unborn were protected by the U.S. Constitution. Thus the killings commenced.

And this Court has maintained the killings by steadfastly refusing to allow evidence to be presented on behalf of the unborn to prove that their lives are protected by the U.S. Constitution.[19]

The unborn have a constitutional right to present evidence in this case to prove that their lives are protected by the U.S. Constitution.[20] Judges who willfully deny

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18. Petition for Rehearing 3,4,5,6,8, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

19. See cases in note 2, supra.

20. See note 3, supra.

this right are guilty of crime.[21] This denial makes Roe v. Wade void.

The procedures used by the Court to effect and maintain the Roe v. Wade killings are essentially the same procedures cited by the Nuremberg Court as part of the evidence to convict the Nazi judges of complicity in extermination and murder.[22] Such procedures are murder and make Roe v. Wade void.

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21. See note 4, supra.

22. "In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them.... They were ... denied the right of counsel of their own choice....(T)he accused learned only a few moments before trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from beginning to end were secret and no public record was allowed to be made of them." United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1046-1047 (1951). "Such a mock trial is not a judicial proceeding but a murder." Id., at 1164. "The dagger of the assassin was concealed beneath the robe of the jurist." Id. at 985.

II.
ISSUES RAISED BY COUNSEL NOT RAISED BY THE PARTIES

1. THE U.S. CONSTITUTION'S UNIVERSAL GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

The parties have not raised the question of whether the lives of the unborn are protected by the U.S. Constitution, which disposes of all issues in this case.

The unborn have a right to assistance of counsel, to present evidence and arguments not presented by the parties, to show that the Constitution's universal guarantee of life to "any person" does include the unborn.[1]

2. THERE IS A U.S. GOVERNMENT CONSPIRACY TO IMPOSE ON THIS NATION BY DECREE THE EXACT DOCTRINES WHICH THE UNITED STATES ITSELF CONDEMNED AS MURDER AT NUREMBERG.

At Nuremberg the Nazi judges claimed they could not be held accountable for the extermination of millions of Jews and other

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1. This evidence and arguments are presented in the amicus curiae brief by the Legal Defense For Unborn Children, filed herein, and incorporated by reference.

minorities because "the supreme judge" of Nazi Germany had decreed those killings to be legal, and under Nazi law, which they had to obey, those killings were legal.[2] Yet the United States prosecuted the Nazi judges, and the Nuremberg court convicted them of complicity in extermination and murder: "The dagger of the assassin was concealed beneath the robe of the jurist."

Yet the record proves that the U.S. Supreme Court conspires to impose those exact doctrines on America by decree. This Court decreed killings to be "liberty" which the people had defined by their homicide statutes to be "murder."[3] This Court decreed mass murder to be legal, just as "the supreme judge" of Nazi Germany decreed mass murder to be legal. By merely changing the names of the victims, this Court has

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2. United States v. Altstoetter [The Justice Case], supra, at 983-985, 1011-1014.

3. See amicus brief by Legal Defense for Unborn Children, supra note 1, pages 10-22.

duplicated the decree of "the supreme judge" of Nazi Germany.

When the U.S. Supreme Court was accused of mass murder in U.S. District Courts, the U.S. Government defended it by claiming that its Supreme Court had the power to decree the mass murder of anyone to be legal. The U.S. Government expressly argued that the U.S. Supreme Court must be obeyed even if it decreed a liberty to kill Jews with impunity from murder statutes:

> [U.S. District Judge]: Let me ask you to respond to this question. The plaintiff argues in his brief that the Supreme Court in Roe v. Wade took a discrete group of entities and said that these entities have no right to live, and thus may be killed .... And he said if you take Roe v. Wade and remove the word "fetus" and just substitute most any other word you want of another discrete group, that we wouldn't be here discussing this at all. Let's say that instead of "fetus," they said "Jews." That is the one he used in his brief.
>
> Would you argue stare decisis to me if, under Roe v. Wade, at the whim of neighbors Jews could be put to death?

> [U.S. Govt. Lawyer]: (I) would have to agree with the doctrine of stare decisis and advance it to the court.[4]

Thus the U.S. Government has defended the Justices of this Court from accusations of mass murder by claiming the same doctrines which the United States itself prosecuted as complicity in murder and extermination at Nuremberg. It was undisputed that in Roe v. Wade the Supreme Court decreed killings to be "liberty" which legislatures had defined to be "murder." It was undisputed that the victims were being killed in defiance of murder statutes. And in defending the Justices against accusations of mass murder, the U.S. Government expressly claimed that the Supreme Court has the power to decree the mass murder of Jews, or anyone, to be liberty, and all courts must obey.

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4. Ernest v. United States Attorney for the Eastern District of Virginia, U.S. District Court in Richmond, Civ. No. 84-0858, transcript of proceedings at 21-22, cert. denied 475 U.S. 1084 (1986).

Although the U.S. District Judge objected that Roe v. Wade was "the worst decision by the Supreme Court in the history of the Court," the U.S. District Judge adopted the U.S. Government's arguments that he must obey the U.S. Supreme Court no matter whom it decreed a liberty to kill.[5]

The petition for review in the U.S. Supreme Court accused it of mass murder:

> For the 67th time, the U.S. Supreme Court is accused in its own Court with mass murder in violation of state and federal statutes.[6]

The U.S. Government waived its right to oppose the petition for review, and thus the U.S. Supreme Court was accused of mass murder in its own court and the accusations were unopposed. Yet this Court neither denied that it was guilty of mass murder, nor objected to the trial court ruling that

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5. Petition for Cert. at A1, Ernest v. United States Attorney for the Eastern District of Virginia, cert. denied without comment, 475 U.S. 1084 (1986).

6. Petition for Cert. at 50, supra note 5.

it must obey this Court even if this Court decreed the mass murder of Jews, or anyone, to be liberty. If any Justice had believed that the U.S. Supreme Court did not have the power to decree the mass murder of Jews or anyone to be liberty, the Justice would certainly have noted his or her objection. But no such objection was noted.

This record proves a conspiracy by the executive and judicial departments of the government of the United States to impose on this nation the very doctrines which the United States itself condemned as complicity in extermination and murder at Nuremberg. Only the names of the victims being killed have been changed.

Moreover, each Justice of the U.S. Supreme Court was named as a defendant in a civil suit, and accused in a State court of mass murder and treason.[7] The State court

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7. Ernest v. Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy, et al, filed in the Circuit Court of Fairfax, Virginia, Civil No. 90367.

was asked to "Declare that there was probable cause to believe that the U.S. Supreme Court had conspired to commit murder" in violation of the State murder law.[8] Such a ruling could have been tantamount to the start of the criminal prosecution process against the Justices for mass murder.

History had never seen a moment when it was more imperative to meet charges, and, if possible, deny them. But the Justices did not deny that in Roe v. Wade they decreed killings to be "liberty" which the State had defined to be "murder." Nor did the Justices deny that victims were being killed in defiance of the State murder statute pursuant to Roe v. Wade. Nor did the the Justices deny that they had been repeatedly accused of mass murder and extermination in the U.S. Supreme Court, but they had never attempted to prove the charges to be false. Nor did the Justices deny that they were

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8. Complaint, (supra note 7), at page 44.

seeking to impose the doctrines on the United States which the United States itself condemned as extermination and murder at Nuremberg. To the contrary, this would be their defense.

The U.S. Government removed the case to the U.S. District Court in Alexandria.[9] Even though accused of extermination, mass murder and treason, the Justices did not attempt to show one single allegation in the complaint to be wrong in fact or law. The record shows the charges to be true.

Rather the Justices, through their U.S. Government lawyers, claimed that the U.S. Supreme Court has the power to decree mass murder of anyone to be liberty, and all lower courts must obey.[10] The Justices also

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9. Ernest v. Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy, et al, removed to the U.S. District Court in Alexandria, Civil No. 89-732-A.

10. The Justices claimed that the District Court "is prohibited by stare decisis from granting the relief requested in this action." Although a trial court was asked to find probable cause that the Justices had

claimed that after the Supreme Court had decreed (without any trial) mass murder to be liberty, the victims being killed in violation of murder laws could not appear in court and challenge the validity of the decree.[11] And the U.S. District Judge adopted these claims as law by summary decree, without even permitting a hearing in the cause, or showing even one single allegation in the complaint to be wrong in fact or law.

Thus, to defend themselves against accusations of mass murder and treason, each Justice of the U.S. Supreme Court boldly

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conspired to commit mass murder, the Justices defended themselves by claiming "a precedent of [the Supreme] Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." Ernest v. Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy, supra, Govt. Memorandum in Support of Motion to Dismiss, page 3.

11. Ernest v. Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy, supra, Govt. Memorandum in Support of Motion to Dismiss, at page 4.

claimed the absolute power to decree mass murder to be liberty, by mere decree without trial, no matter who the victims might be, and this claim is now accepted by all courts of the United States, the U.S. Congress, and the U.S. President, as the law of the land.

Moreover this has been the steadfast policy of the United States, asserted in court after court, for almost two decades.[12] All the lower judges, who have upheld this Court's claim of power to condemn millions to death by decree, are accused here of complicity in extermination, mass murder and treason to the U.S. Constitution.[13]

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12. Some of these cases are: U.S. District Court in Alexandria (Civ. No. 89-732); U.S. District Court in Salt Lake City (Civ. No. 85-0026; U.S. District Court in Richmond (Civ. No. 84-0858); U.S. District Court in Portland (Civ. No. 81-0272).

13. U.S. DISTRICT JUDGES: Albert V. Bryan, Jr.; Emmett R. Cox; Edward T. Gignoux; Harold H. Greene; J. Thomas Greene; William B. Hand; Joseph C. Howard; Martin F. Loughlin; Robert Earl Maxwell; Louis F. Oberdorfer; Raymond J. Pettine; Aubrey E. Robinson, Jr.; John J. Sirica; James R. Spencer; James C. Turk; D. Dortch Warriner; Don J. Young. U.S. CIRCUIT JUDGES: D.C. Circuit- David L. Bazelon; Carl McGowan;

President Clinton has repeatedly scorned pleas to repudiate the U.S. Government's claims that its Supreme Court has the power to decree the mass murder of Jews or anyone to be legal. The President was informed:

> The general rule is that mistake of law is no excuse for breaking the law. The narrow exception of reasonable reliance on an official judicial opinion, thereafter found to be a mistake of law, does not even apply in homicide cases. So if the U.S. Government's claim of unlimited power (that its Supreme Court has the power to decree the mass murder of Jew or anyone to be liberty and such

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Roger Robb; George E. MacKinnon; Spotswood Robinson III; J. Skelly Wright; Edward A. Tamm; Malcolm R. Wilkey. First Circuit- Levin H. Campbell; Frank M. Coffin; Hugh H. Bownes; Stephen G. Breyer. Fourth Circuit- Harrison L. Winter; Donald S. Russell; H. Emory Widener, Jr.; Kenneth K. Hall; James D. Phillips, Jr.; Francis D. Murnaghan, Jr.; James M. Sprouse; Sam J. Ervin, II; Robert F. Chapman. Eleventh Circuit- John C. Godbold; Paul H. Roney; Gerald B. Tjoflat; James C. Hill; Peter T. Fay; Robert S. Vance; Phyllis A. Kravitch; Frank M. Johnson, Jr.; Albert J. Henderson, Jr.; Joseph W. Hatchett; R. Lanier Anderson, III; Thomas A. Clark. AND the judges in Roe v. Wade and Doe v. Bolton who decreed a "liberty" to kill the unborn without any investigation to see if their lives were protected by the Constitution: Circuit Judges Morgan and Goldberg; District Judges Smith, Henderson, Hughes and Taylor.

> decrees must be obeyed as the supreme law of the land) ultimately turns out to be a mistake of law, then all the government officials responsible for this lawless claim, which they used to perpetuate mass killing of children in open defiance of murder statutes, will be guilty of complicity in a national scheme of mass murder.
>
> ....
>
> If the U.S. Government's claim of unlimited ... power turns out to be a mistake of law, and you refuse to repudiate it while victims are actually being killed in defiance of murder statutes, then your acquiescence can implicate you in a national scheme of mass murder. This letter becomes a part of the record of this case as evidence of what you knew, and when you knew it.[14]

Yet while the victims were being killed in defiance of murder statutes, President Bill Clinton has publicly endorsed the Roe v. Wade killings on numerous occasions, and his lawyers argue for a wider interpretation of the law in this very case to protect the killings. President Clinton has continued such advocacy of the killings despite repeated notices that such advocacy of the

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14. Letter to President Clinton dated March 31, 1993, certified no. P 867-382-498, received by the White House April 9, 1993.

killings could implicate him in a national scheme of extermination and mass murder. Thus a U.S. President have contributed to this giant conspiracy to kill victims in defiance of murder statutes, and to impose on the United States the doctrines which the United States itself condemned as extermination and murder at Nuremberg. A jury could find this amounts to complicity in extermination, mass murder and treason.

Leaders of the U.S. Congress have also helped this conspiracy.[15] By acts of commission or omission, leaders of the U.S.

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15. The complaint, (supra note 7), at page 3, alleged that various members of the committees on the Judiciary, whose particular duty was to control the courts, were a part of the conspiracy: "The co-conspirators include ex-Chairman Peter Rodino, Chairman Rep. Jack Brooks, sub-committee chairman Rep. Don Edwards, sub-committee chairman Rep. Robert Kastenmeier; Chairman Sen. Joseph Bidden, ex-Chairman Sen. Edward Kennedy. A jury could find this conspiracy to be murder." A jury might also convict other leaders of the U.S. Congress, such as Rep. Thomas Foley, Speaker of the House; Sen George Mitchell, Senate Majority Leader; and numerous members of the House and Senate Judiciary Committees.

Congress have helped the federal judicial and executive departments in this gigantic conspiracy to kill victims in violation of murder statutes, and to impose on the United States the exact doctrines which the United States itself condemned as murder at Nuremberg.[16] A jury could find this amounts to complicity in extermination, mass murder and treason.

The leaders of all three branches of the government of the United States escape the accusation that they conspired to commit capital mass murder - to kill children in violation of murder statutes - by merely claiming the same defense which the United

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16. When the U.S. Congress held hearings on Roe v. Wade, it conspired to allow all the false evidence in Roe v. Wade to be presented, but refused to allow the rebuttal to be presented, and thus Congress conspired to present falsehood to the nation as if it were the truth. Moreover leaders of Congress have deliberately defied their constitutional duty to control this Court, knowing full well that their defiance would directly contribute to the death of the victims in violation of murder statutes. And many leaders of Congress have publicly endorsed Roe v. Wade and thus its killings.

States itself condemned as mass murder at Nuremberg. This is surely a signal event in the history of mankind's search for a government of laws, and not of men.

This is a conspiracy by leaders of the judicial, executive and legislative branches of the government of the United States: (1) to claim the unlimited power to decree the mass murder of anyone to be legal; (2) to actually kill victims in violation of murder statutes; and (3) to supplant the U.S. Constitution as the supreme law of the land, and to impose the legal system on the United States by judicial fiat, which was adjudged to be extermination and murder at Nuremberg.

Leaders of the national news media have also helped this conspiracy. Even though the U.S. Supreme Court was accused of mass murder in The Washington Post,[17] and the Court has never attempted to prove a word of

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17. "WASHINGTON LAWYER CHARGES U.S. SUPREME COURT WITH MASS MURDER," published in The Washington Post, Sept 12, 1979, page A6.

the accusation to be wrong, that newspaper continued its policy of editorially advocating the Roe v. Wade killings despite repeated notices that its encouragement could amount to complicity in mass murder.[18] Even as the United States defended its officials against charges of mass murder by claiming the absolute power to decree the mass murder of anyone to be liberty, that newspaper covered up the news, and continued to advocate the killings. Since words of encouragement can amount to complicity in murder, (mass murder is not free speech), a

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18. The Washington Post, The New York Times, The Los Angeles Times, and The Wall Street Journal, have been warned almost 100 times that advocacy of murder is not free speech; that even a sincere belief that Roe v. Wade is good law is no defense, since ignorance of the law is no defense, and the narrow exception of reasonable reliance on a court decision does not apply in homicide cases. See authorities in amicus brief (supra note 1) at p.62 n.6. And while they advocated the killings, these news giants covered up the most catastrophic news in world history - that the U.S. Government officially claimed the power to decree (without any trial) the mass murder of Jews, or anyone, to be liberty.

jury could surely find such advocacy to be complicity in mass murder and treason.

Nor can we forget that there is formidable precedent for such giant conspiracies in the United States.[19]

In explaining how the monstrous crimes of the Nazi regime went unchecked, Winston Churchill merely quoted Machiavelli: "Men avenge slight injuries, but not grave ones." In this manner America is ruled by a giant conspiracy to kill victims in violation of murder statutes. The words of the Nuremberg Court also describe this conspiracy: "The dagger of the assassin was concealed beneath the robe of the jurist." That the United States can be ruled for two decades by a giant conspiracy to kill children in open defiance of murder statutes is the most

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19. Abraham Lincoln accused the U.S. Supreme Court, several U.S. Presidents, leaders of the U.S. Congress, and leading newspapers of conspiring to make slavery legal everywhere and to overturn the foundation of the U.S. Government. See "A House Divided" speech, 2 Collected Works of Abraham Lincoln 461 (Basler ed. 1953).

catastrophic crime in the history of civilization, which draws a terrifying darkness over the future of all humankind.

CONCLUSION

The Court is moved to allow counsel to represent the unborn and defend their right to life under the U.S. Constitution, and to prove that the Constitution's universal guarantee of life to "any person," expressly written in the Fifth and Fourteenth Amendments, does include the unborn. Thus the States have a duty to protect unborn life.

Alan Ernest, Counsel

No. 92-780

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

NATIONAL ORGANIZATION FOR WOMEN, INC.

PETITIONER

v.

JOSEPH M. SCHEIDLER, ET AL

RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE WITH BRIEF BY LEGAL DEFENSE FOR UNBORN CHILDREN IN SUPPORT OF NEITHER PARTY

ALAN ERNEST
COUNSEL

P.O. BOX 4041
RIO RICO, ARIZONA 85648
(602) 281 - 7513

BEST AVAILABLE COPY

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Interest of Amicus

The amicus curiae brief, which does not support any party, defends the constitutional right to life of the unborn, which the parties have not done.

Argument

The amicus proves that the the Fifth and Fourteenth Amendments' guarantee of life to "any person" does include the unborn. Thus this Court must not only overrule Roe v. Wade, 410 U.S. 113, it must rule that the States have a duty to protect unborn life. The parties have not raised this issue; it disposes of all issues in this case.

Consent

By time of printing, neither party had provided written consent to file the brief.

Conclusion

The universal guarantee of life to "any person" is the most important right in the Constitution. The lives of millions of

children depend on their being permitted to present all relevant evidence and arguments to prove that the universal guarantee of life to "any person," made in the U.S. Constitution, does include the unborn.

Alan Ernest
Counsel

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Interest of Amicus

The amicus defends the right to life of the unborn, which the parties have not done.

Summary of Argument

The Constitution's guarantee of life to "any person," made in the Fifth and Fourteenth Amendments, does include the unborn.

Argument

I.

THE CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

1. THE LETTER OF THE CONSTITUION, THE UNIVERSAL GUARANTEE OF LIFE TO "ANY PERSON," ON ITS FACE INCLUDES THE UNBORN.

The 5th and 14th Amendments guarantee that not "any person" can be deprived of "life ... without due process of law." The words "any person" are universal, admit of no exceptions for anyone, make no distinction between born and unborn life, and thus on their face include the unborn, the same as everyone else. The obvious purpose of guaranteeing life universally to "any person" was to forbid making exceptions so some persons could be exterminated.

The Court admitted that if the word "person" included the unborn, then Roe v. Wade "collapses," because the unborn's lives would be "guaranteed" by the Constitution.[1] In ruling "the word 'person' ... does not include the unborn,"[2] the Court hit the Constitution head on, did what is expressly forbidden, and directly defied the letter of the law of its most important guarantee.

The words "any person" are the two most important words ever written into law. The guarantee of life to "any person" is the single most important guarantee because it protects the lives of everybody from government sanctioned extermination, as happened in Nazi Germany.

And the words "any person" give legal body to the spirit that "all men are created equal" and endowed with an "unalienable" right to life. The words "any person" exactly summarize what America stands for,

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1. Roe v. Wade, 410 U.S. at 156-157.

2. Roe v. Wade, 410 U.S. at 158.

its unique contribution to civilization. As Abraham Lincoln said, what made America great was the promise "not alone to the people of this country, but hope to the world for all future time ... that ALL should have an equal chance."

The words "any person" are the very words which guarantee that equal chance to "ALL"; they stand as the supreme political achievement of the human race, the prize of milleniums of struggle. If the Constitution had stated it protected the life of "any person - except the unborn," then its words would support Roe v. Wade. But its words say "any person," without any exceptions at all.

The Supreme Court of West Germany held that the words, "Everybody has the right to life," did include the unborn; it explained that the word "everybody" is universal.[3]

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3. R. Destro, Abortion and the Constitution The Need For A Life Protective Amendment, 63 Cal. L. Rev. at 1341-51 (1975). In 1975 the Supreme Court of West Germany ruled that the phrase in its Constitution, "Everybody has the right to life," did include the unborn, that "Abortion is an act of homicide," and

The Constitution extends its guarantee of life to "any person." The letter of the law permits no exceptions; on their face the words "any person" do include the unborn.

2. THE MODIFIER "ANY" INVOKES A VIRTUALLY IRREBUTTABLE PRESUMPTION THAT THE GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES THE UNBORN.

The Court never studied the letter of the law - the universal words "any person." Instead the Court focused on the isolated word "person," and ignored its modifier "any," which invokes a virtually irrebuttable presumption in favor of life that the words "any person" do include the unborn.[4]

By reading the guarantee of life to "any person" as if it merely said "some persons," the Court did the most forbidden

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the state had a "duty ... to protect unborn life." It noted "Everybody" is universal:

> The right to live is guaranteed to everybody who is "alive." No distinction can be made among the several stages of developing life before birth, or between prenatal or postnatal life. "Everybody" ... means every "living person,"... therefore, "everybody" in this sense also includes unborn human beings.

4. See burden of proof, infra p. 39.

thing and reduced to nothing what is deemed the most important law in the history of political institutions.

3. THE SPIRIT OF THE LAW, THAT "ALL MEN ARE CREATED EQUAL," SHOWS THE GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES THE UNBORN.

Roe v. Wade violates the spirit of the law, as well as its letter. The promise that "all men are created equal" and endowed with an "unalienable" right to "life" is the guiding spirit of American law. The Supreme Court itself ruled it is the spirit of the Fourteenth Amendment:

> "The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life...' While such declaration of principles may not have the force of organic law ... yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than ... to secure the equality of rights which is the foundation of free government." Gulf, Colo. & S. Fe Ry v. Ellis, 165 U.S. at 159-160 (1896).

There is no real medical dispute that the unborn have been created.[5] Reading the letter of the Constitution, the guarantee of life to "any person," in the spirit that "all" are "created equal," and "all" shall get their equal chance to live, proves that the words "any person" do include the unborn. Concerning the right to life, the unborn are the equal of anyone.

4. HISTORY SHOWS THE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

The last time this Court attempted to imply an exception to the words "any person" was Dred Scott v. Sandford, 19 How. 393 (1857). The 13th and 14th Amendments were intended to overrule this decision that the words "any person," as used in the 5th Amendment, did not include Negroes; there was a constitutional right to own a slave; the phase "all men are created equal" did

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5. The uncontradicted medical evidence in the Texas brief in Roe v. Wade showed the fetal heart begins "pulsations at 24 days"; and "brain waves have been noted at 43 days"; and the unborn child is "alive."

not include Negroes; Congress could not prohibit slavery in the territories; and Negroes could not sue in federal court to see if they were slave or free.

Abraham Lincoln was a leading opponent of Dred Scott. If officials can say all men are created equal except Negroes, he asked, "where will it stop?" He denounced Dred Scott as based on "falsehood," and he alleged a conspiracy by the U.S. Supreme Court, two Presidents, and leading members of Congress, to make slavery legal everywhere and overturn the foundation of our government. Explaining why he would not obey it, President Lincoln said that Dred Scott resulted in "the rule of minority, as a permanent arrangement" which was "wholly inadmissible" and if the President were bound by Dred Scott, "the people will have ceased, to be their own rulers."

Dred Scott triggered a civil war, and President Lincoln defied the Court's decision, that there was a constitutional

right to own a slave, when he emancipated slaves and declared them to be "forever free." He reminded us at Gettysburg that we were fighting to see whether a nation dedicated to the principle that "all men are created equal" could "long endure."

The Fourteenth Amendment was intended to rededicate this nation to this original proposition. One of its framers explained:

> "It establishes equality before the law, and it gives to the humblest ... the most despised ... the same protection before the law as it gives to the most powerful.... Without this ... there is no republican government." Rep. Jacob Howard, quoted in 1 B. Schwartz, Statutory History of the United States: Civil Rights 262 (1970).

The framers intended to prevent another Dred Scott catastrophe of judges ever again implying exceptions to the words "any person" to exclude anyone; they employed the universal words most suited for this purpose. And the people had already enacted criminal abortion laws to protect all stages of unborn life, showing the guarantee of life to "any person" means what it says.

Roe v. Wade is simply another Dred Scott disaster which rests on historical contradictions so insane that to permit it is to confess that men cannot be governed by truth, reason, or laws.[6] The Court did the most forbidden thing, and defied the Constitution's guarantee of life to "any person," the two most important words ever written into law.

The letter of the law, its spirit, its history, its presumption in favor of life, the medical facts known to the 19th century, as well as the 20th, unite to permit only one lawful conclusion: the guarantee of life to "any person" does include the unborn.

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6. Roe v. Wade rests on the contradiction that without one word of explanation, the framers intended their very promise of life to all, to "any person," to sweep away all their abortion statutes, and make killings, which they had already condemned as criminal, a fundamental "liberty" ranked along with free speech. Roe v. Wade further pretends that the framers somehow silently connived to repudiate a major point of the civil war, so that, in the manner of Dred Scott, judges would be at liberty to again produce more convulsions by implying more exceptions to the words "any person."

II.

ROE v. WADE IS VOID BECAUSE IT CRIMINALLY DEFIED THE CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" AND CONDEMNED TO DEATH MILLIONS OF VICTIMS WHOM THE CONSTITUTION ENDEAVORS TO PRESERVE.

1.

ROE v. WADE CRIMINALLY DEFIED THE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT DECREED KILLINGS TO BE "LIBERTY" WHICH THE PEOPLE HAD DEFINED TO BE "MURDER." THE COURT DECREED "MASS MURDER IS LIBERTY."

When the Fourteenth Amendment was adopted in 1868, an abortion was murder if the child was "born alive." And a child could be "born alive" long before the Court's arbitrary point of "viability."[1]

An 1859 study by the American Medical Association stated the law of murder throughout the United States:

> If a person, intending to procure abortion, does an act which causes the

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1. This Court arbitrarily set the point, where the law could begin to protect the unborn, at "viability" (about 7 months gestation) "because the fetus then presumably has the capability of meaningful life outside the ... womb." Roe v. Wade, supra, 163. The point is arbitrary, because the Court cannot explain why (in legal and medical precedent) it can be criminal to kill the unborn a few days after viability, but must be "liberty" to kill the unborn a few days before. The Court invented it.

> child to be born earlier than its natural time, and therefore in a state much less capable of living, and it afterwards die in consequence of such premature exposure, the person who by this misconduct brings the child into the world, and puts it into a situation in which it cannot live, is guilty of murder.[2]

Yet in 1973, without any investigation of the law of murder, the Court decreed this very killing to be "liberty" which the American people had universally defined to be "murder." In plainest terms, the Supreme Court decreed: "MASS MURDER IS LIBERTY."

A. THE ENGLISH COMMON LAW WAS THE LAW OF THE LAND IN COLONIAL AMERICA

America's first settlement at Jamestown followed the English common law, as did other colonies. The common law defined an abortion in which a "quick" (about 4 months gestation) child died after being "born alive" to be "murder."[3] So if

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2. Reported in A.S. Taylor, A Manual of Medical Jurisprudence 462 (6th ed. 1866). He described the AMA report as "a complete and comprehensive exhibit of laws of each of the United States." Id., at 460.

3. Coke, 3 Inst. 50; Hawkins, 1 Hawkins Ch. 13, s. 16; Blackstone, 4 Bl. Com. 198.

the child were "born alive" (even if not "viable"), Coke said the abortion is "so horrible an offense" and "this is murder."[4]

Regina v. West involved this very abortion of a quick, but pre-viable child:

> "The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery ... by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died.
> ....
> "A medical witness stated ... that it was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Regina v. West, 2 C & K 784, 786-788 (1848).

Although not yet viable, the judge cited Coke and instructed the jury that if the child were "born alive," the abortion was

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4. Coke, 3 Inst. 50. "This work is executed with so much learning and judgment, that I do not recollect that a single position in it has ever been judicially denied....(I)t may still be considered as the fundamental code of the English law." 14 The Writings of Thomas Jefferson 57 (Bergh ed. 1907). Jefferson was an authority on colonial law, serving on the 1776 committee which adapted Virginia's laws to republican form, the common law being assigned to him.

murder.[6] The English writers cited this as the correct statement of the law.[7]

Thus Roe v. Wade decreed killings to be "liberty" which had been condemned as "murder" since earliest colonial times.

B. "BORN ALIVE" ABORTIONS WERE MURDER WHEN THE FOURTEENTH AMENDMENT WAS ADOPTED.

The English common law is the dictionary which courts use to construe the state and federal homicide statutes.[8]

By the time the Fourteenth Amendment was adopted, American legal authorities had

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6. Regina v. West, 2 C & K at 788: "I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder."

7. 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783 (Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-672 (4th ed. 1865).

8. Clarke v. State, 117 Ala. 1 (1898); Hamilton v. United States, 26 App. D.C. 382 (1905).

long followed the common law rule that abortions of pre-viable children "born alive" were murder. In 1858 the preeminent legal writer of the 19th century explained:

> "If a person intending to procure abortion, does an act which causes a [quick] child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies, in consequence of its exposure to the external world, the person who by this misconduct, so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder" F. Wharton, A Treatise on the Law of Homicide in the United States 93 (1855).

This was the uncontradicted view in the United States when the Fourteenth Amendment was adopted.[9] Courts applied this law of murder.[10] It was still the law in 1973.[11] In 1975 the New Jersey courts

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9. 2 J.P. Bishop, Commentaries on the Criminal Law 365 (4th ed. 1868); A.S. Taylor, supra, 462, 517.

10. Clarke v. State, 117 Ala. 1 (1898). "In Georgia ... the wilful killing of an unborn child so far developed as to be ... called 'quick,' is considered as murder." Porter v. Lassiter, 87 S.E. 2d 100, 102 (1955).

11. R. Perkins, Criminal Law 30 n.17 (2d ed 1969).

applied this 17th century murder law to the killing of a pre-viable fetus born alive:

> That a fetus may be the victim of murder if it be born alive has long been a part of our common law....Coke, Institutes 58 (1648).[12]

For almost four centuries governments came and went, but the law that born alive abortions are murder, which is binding on the U.S. Supreme Court,[13] remained the law of the land.

Thus Roe v. Wade decreed killings to be "liberty" which had been universally condemned by the framers and adopters of the Fourteenth Amendment to be "murder."

C. THE GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES CHILDREN GUARDED BY THE MURDER LAW

The guarantee of life to "any person" in the Fourteenth Amendment must include

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12. State v. Anderson, 343 A. 2d 505, 508 (1975), affirmed 413 A. 2d 611 (1980). The courts rejected the claim it was not murder because "the infants were never capable of maintaining a separate and independent existence." Id. at 615.

13. Chief Justice Marshall ruled that the Supreme Court must accept the construction given by a state to its own statute. Pollard v. Dwight, 4 Cranch 421, 429.

all persons whose lives were protected by the law of murder when the Amendment was adopted. No dispute is even possible.

If the killing of Jews had been defined to be murder in 1868, it is certain that the framers did not intend to exclude Jews from the guarantee of life to "any person" so it would be "liberty" to kill Jews with impunity from criminal laws. Changing the names of the victims does not change the legal result.

The people who framed and adopted the Amendment had condemned the taking of a crying, pre-viable infant from its mother's womb to be murder. Thus it is certain that they did not intend to exclude the lives of these children from the guarantee of life to "any person" so it would be "liberty" to kill them with impunity from murder laws.

By arbitrarily setting "viability" as the point the law could begin to protect unborn life, the Court decreed the same

killing to be "liberty" which the American people had condemned as "murder."

The words "any person" do indisputably include children protected by the law of murder. And since personhood under the Constitution does not just fade away with time, like some magic disappearing ink, the right to life of these children is still guaranteed by the Fourteenth Amendment.

D. ROE_v._WADE_ALLOWS_HYSTEROTOMY_ABORTIONS

Roe v. Wade hysterotomy abortions, basically Caesareans, result in children "born alive."[14] As explained to Congress:

> With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry.... Almost all were born alive.[15]

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14. Jeffries and Edmonds, Abortion: The Dreaded Complication, Philadelphia Inquirer, August 2, 1981.

15. Hearings on Constitutional Amendments on Abortion, before subcomm. on Civil and Constitutional Rights, of the House Comm. of the Judiciary, 94th Cong., 2d Sess., Ser. 46, Part 1, at 397 (1976) (statement by Dr. John Willke, M.D.). There are about 140,000 second stage abortions each year. Washington Post, April 26, 1985, A11. Most methods can result in a child born alive.

When the Fourteenth Amendment was adopted, these hysterotomy abortions were murder. Thus the lives of the children are still guaranteed by the Amendment, and the killings are still murder.

F. THE DECREE "MASS MURDER IS LIBERTY" OVERTHROWS THE U.S. CONSTITUTION

Is a government of laws founded upon evidence, or the mere naked decrees of men holding office for life? The evidence proves that the lives of these children are guaranteed by the U.S. Constitution.

This evidence for the unborn is exactly the same evidence which many people must rely upon to prove their lives are guaranteed by the U.S. Constitution.[16] If

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16. Suppose it were claimed in federal court that it is "liberty" to kill the insane, or invalids, or Jews. What factual, non-argumentative evidence could be found to establish their right to life under the U.S. Constitution?

As with the unborn, it would do no good to object that no one ever heard of a "liberty" to kill them - or to object that such killings had thereto been criminal.

The Amendment merely states that it protects the life of "any person." So, as with the unborn, it does not expressly

the evidence is ineffective for the unborn, then the Roe v. Wade precedent can grow to a "liberty" to kill virtually anyone. If the Supreme Court decreed it "liberty" to kill Jews, this same evidence would prove it "murder," and not "liberty." Judges may have more sympathy for other victims, but changing the names of the victims will not change the legal result.

Roe v. Wade murders reason itself. In his novel, "1984," Orwell described how a tyranny defrauded its subjects into obedience with the "doublethink" slogan "FREEDOM IS SLAVERY." Although this science fiction appears improbable, the U.S. Supreme Court has defrauded the United

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refer to them; and its legislative history does not appear to expressly refer to them.

The principle that all people are "created" equal, with an "unalienable" right to "life," having been sneered out of court in Roe v. Wade, now provides no assurance for anyone.

As with the unborn, the murder laws don't expressly refer to the insane, or invalids, or Jews; the intention of the legislators is found in the common law.

If the evidence cannot protect the unborn, the lives of many are imperiled.

States into obedience with the ultimate falsehood: "MASS MURDER IS LIBERTY."

Abraham Lincoln ridiculed Dred Scott by reducing it to its plainest terms:

> [We hold these truth to be self-evident, that] all men are created equal - except Negroes.
> That if any one man, choose to enslave another, no third man shall be allowed to object.

The Fourteenth Amendment intended to prevent this forever. Yet Roe v. Wade, reduced to its plainest terms, asserts:

> We hold these truths to be self-evident, that all men are created equal - except those created to be murdered.
> That if any one man, choose to murder another, no third man shall be allowed to object.

By changing the names of the victims, the Supreme Court has duplicated the decree of "the supreme judge" of Nazi Germany who asserted the killing of Jews to be legal.[17]

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17. United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1011-1014 (1951). The Nazi judges claimed that they could not be held accountable for complicity in extermination and murder, since they had acted "within the authority" of the "decrees" of "the supreme judge." Id. at

The key doctrines of the Nazi judiciary have been adopted by the courts of the United States: a "supreme judge" which decrees mass murder to be legal; and lower judges who rule they must blindly obey.[18]

The Court did exactly what the guarantee of life to "any person" was intended to prevent, and decreed murder to be legal, by giving "murder" the new name "liberty." But Chief Justice Marshall condemned such sham:

> "Is the proposition to be maintained that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief which is expressly forbidden by words most appropriate for its description; may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be evaded by giving a new name to an old

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983-85. Their "supreme judge" had decreed killings to be legal which had been defined by statute to be criminal. But the tribunal held, "The dagger of the assassin was concealed beneath the robe of the jurist."

18. Ernest v. U.S. Attorney etc., cert. denied 475 U.S. 1084 (1986). The U.S. District Judge ruled that Roe v. Wade was "the worst decision by the Supreme Court in the history of the Court." But he stated that even if the Supreme Court decreed it liberty to kill Jews, he must obey and permit the killings to continue.

thing? We cannot think so." Craig v. Missouri, 3 Pet. at 433 (1830).

Thus the United States is ruled by the decree "MASS MURDER IS LIBERTY." But murder is still murder, no matter what new name the Court may give it. This is the most catastrophic crime in history. This precedent of judicial alchemy to convert "murder" into "liberty" can be arbitrarily evoked to kill anyone; it cancels the "unalienable" guarantee of life, and makes the life of everybody depend on the mere whim of this Court. Indeed, in defending itself against accusations of mass murder, the Court claimed the power to decree the mass murder of Jews, or anyone, to be liberty. Instead of government by truth and laws, government is now reduced to the mere matter of which murderer can grab power, issue the orders, and be obeyed. Again people must struggle to ensure that the nation dedicated to the proposition that "all men are created equal" shall not "perish from this earth."

2.

ROE v. WADE CRIMINALLY DEFIED THE CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT FABRICATED EVIDENCE TO FALSELY IMPLY THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN.

The 19th century abortion statutes supplanted the medieval view that unborn life began at "quickening"[1] and expanded protection of law to all stages of unborn life; they prove the Constitution's guarantee of life to "any person" includes the unborn, that no distinction can be made among the stages of unborn life.

When the Fourteenth Amendment was adopted in 1868, over three-fourths of the ratifying states had already made abortion at any stage of gestation a crime.[2] Within a few years, these statutes were universal.

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1. "Life is the immediate gift of God, a right inherent by nature in every individual: and it begins in contemplation of law as soon as the infant is able to stir in the mother's womb." 1 Bl. Com. 126.

2. The statutes are set out in Quay, Justifiable Abortion, Medical and Legal Foundations, 49 Geo. L. J. 447-520 (1961).

And in those few States still following the common law, judicial revision makes it impossible for this Court to assert with any assurance that it was any different than the prevailing statutes:

> By the ancient common law ... as the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offense to commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by Courts of high character that abortion is a crime at common law without regard to the stage of gestation.[3]

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3. Lamb v. State, 67 Md. 524 (1887). Some state supreme courts rejected medieval medical views and ruled that the common law made abortion at any stage of gestation a crime. Mills v. Comm., 13 Pa. 631 (1850); State v. Slagle, 83 N.C. 544 (1880); State v. Reed, 45 Ark. 333 (1885).

Wharton, a standard 19th century text, stated that under common law "the protection of the law was cast round an unborn child from its first stage of ascertainable existence, no matter whether 'quickening' had taken place or not." F. Wharton and M. Stille, Treatise on Medical Jurisprudence 927-28 (2d ed. 1860).

And those state supreme courts which ruled that abortion prior to quickening was not a common law crime were immediately

The theory of a "liberty" to kill the unborn faced a fatal contradiction. How could the Court dare to Dred Scott-like imply an exception to the guarantee of life to "any person" in order to declare killings to be "liberty" which the people had defined to be criminal? This absurd contradiction wrecks Roe v Wade.

To resolve this fatal contradiction the Court fabricated the hypothesis that the 19th century criminal abortion statutes were not intended to protect unborn life, but were only intended to protect the mother. This falsely implied that the people never intended the lives of the unborn to be protected by law. This false hypothesis was fabricated as follows.

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overruled by their legislatures which made abortion at any stage of pregnancy a crime. Comm. v. Parker, 50 Mass. 263 (1845), was immediately overruled by Mass. Acts & Resolves ch. 27 (1845). State v. Cooper, 22 N.J.L. 52 (1849), was immediately overruled by N.J. Laws at 266 (1849). Abrahams v. Foshee, 3 Iowa 274 (1856) was overruled by the next legislature, Iowa Rev. Laws, tit. XXIII, ch. 165. art. 2, sec. 4221 (1860).

A.

The Court first asserted as fact:

> "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v. Wade, 410 U.S. at 148.

The only authority cited was a 20th century medical history book.[4] But this book only described the hazards of major surgery in general prior to Lister's discovery of antiseptics; the abortion operation was not mentioned anywhere in the entire book.

The 19th century obstetric authorities throughout the Western world prove that abortions by physicians were "perfectly safe" to the woman.[5] They prove the Court's assertion of fact to be false.

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4. Haagensen and Lloyd, A Hundred Years of Medicine 19 (1943), cited in Roe v. Wade, supra, at 148 n.43.

5. 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96 (1802). He was a standard English authority. They based their judgments on their own experience in performing abortions, and from hundreds of cases reported from around the world. In addition to perforation, other procedures were also safe. A French physician wrote "experience has proved that the dangers of the operation are reduced to a small

The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th century physicians generally used the ancient method,[6] which one physician traced back 2000 years,[7] and which they described as "perfectly safe" to woman.

The Court did not examine even one 19th century obstetric textbook; and they prove its assertion, "the procedure was a hazardous one for the woman," to be false.

Since abortion was not dangerous to the life of the mother, the only motivating

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matter." A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530 (4th Am. ed. 1852). The preeminent American physician wrote "to the mother there is very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293 (1864).

6. Dr. Denman, a standard authority in England, wrote in 1802: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus," which resulted in the expulsion of the fetus from the womb, which was "perfectly safe" to the woman. 2 Denman, supra, at 96-99.

7. F. Ramsbotham, M.D., The Principles and Practice of Obstetric Medicine 724 (4th ed. 1856).

purpose the abortion statutes could have had was to protect the lives of the unborn from destruction by abortions, even safe abortions by physicians. Had it been the purpose of the legislators to only protect the mother, they would have simply required abortions, which were known all over the western world to be safe to the mother, to be performed only by physicians.

B.

The Court next asserted: "Abortion mortality was high."[8] This is asserted as fact. The Court cited no authority to support it. The 19th century obstetric authorities prove this assertion to be false; their medical texts show that the abortion operation was "perfectly safe."

The purpose of the Court's false assertion of fact is to go beyond the mere theory that abortion was hazardous to the mother, and infer that the carnage was so

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8. Roe v. Wade, 410 U.S. at 149.

great as to call for legislation to protect women from the medical profession.

C.

Upon these two false assertions of fact, the Court next falsely inferred:

> "[A] State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v. Wade, 410 U.S. at 149.

This is a false inference, drawn from two false assertions of fact. Moreover, the 19th century treatises on criminal law expressly stated that these abortion statutes were intended to supplant the ancient common law and protect the lives of the unborn during all stages of gestation:

> "The notion that a man is not accountable for destroying the child before it quickens, arose from the hypothesis that quickening was the commencement of vitality with it, before which it could not be considered as existing. This "absurd distinction" ... is now exploded in medicine.... The foetus is certainly ... as much a living being immediately after conception, as at any other time before delivery.
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> ....
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> "There is as much vitality ... on one side of quickening as on the other, and ... the infant is as much entitled to

> protection ... a week before it quickens as a week afterwards.... Acting under these views, the legislatures ... passed acts making ante-quickening-foeticide individually penal." 1 F. Wharton, A Treatise on the Criminal Law of the United States 656-57 (5th ed. 1861).

There is no 19th century authority to the contrary. If the purpose of these laws had been to protect the mother, and not the child, these texts would certainly have noted such an important thing.

And State supreme courts ruled that these statutes protected the unborn:

> "(T)he statute ... essentially changed the common law. There is a removal of the unsubstantial distinction, that it is no offense to procure an abortion, before the mother becomes sensible of the motion of the child, notwithstanding it is then capable of inheriting an estate.... It is now equally criminal to produce abortion before and after quickening." Smith v. State, 33 Me 48 (1851).

Since abortions by physicians were known all over the western world to be safe to the mother, the motivating purpose of these abortion laws could only have been to protect the lives of unborn children from destruction from abortions. That

legislatures prohibited safe abortions by physicians, despite the great danger to the mother from abortions by criminals,[9] shows their great respect for unborn life.

D.

The Court next made its irrelevant study of the single word "person," and held it "does not include the unborn":

> "(O)ur observation ... that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v. Wade, 410 U.S. at 158.

The Court could not find even one 19th century authority to support this result; the whole weight rests on the Court's "major portion - far freer" assertion, which is false.[10] The reverse is closer to

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9. "In thirty-four cases of criminal abortion ... twenty-two were followed...by death, and only twelve were not. In fifteen cases necessarily induced by physicians, not one was fatal." H.R. Storer, M.D., On Criminal Abortion in America 43 (1860)

10. The ancient common law only prevailed in the early 19th century. By mid-century, a majority of the States which ratified the Amendment had already enacted statutes

the truth. The evidence indicates that legal abortion was far freer in 1973, than when the Amendment was adopted.[11]

The Court's "major portion - far freer" doctrine, were it even true, is absurdly irrelevant[12] and ominously skirts

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which punished abortion throughout gestation. (Supra n.2) By 1868, over three-fourths had enacted such statutes; and shortly they were universal. In those few states with no statute, this Court cannot claim with assurance that the common law was any different. (Supra n.3) Thus the "prevailing law" for the last half of the 19th century; it was about the same as existed in most states in 1973; and "legal" abortion was not "far freer" then.

11. The statutes listed in Roe v. Wade, 410 U.S. at 140 n37, show that by 1973 four states permitted abortion on demand, while fourteen permitted abortions for other reasons not allowed in 1868. The statutes prevailing in 1868 only permitted abortions to save the life of the mother or child. Thus legal abortion was far freer in 1973 than in 1868, although in most states it was still about the same as it was in 1868.

12. The same thing could be said about "legal slavery," which really was "far freer" for the "major portion" of the 19th century than it is today. Would this prove a right to own a slave today? If the Court could ignore the events of 1860 to 1866 - it could plausibly reaffirm its Dred Scott rule that there was a right to own a slave.

the central issue of the law existing in 1868, and the reason for the vast change.

The Court's assertion that "legal abortion" was then "far freer" refers to the ancient common law that abortion prior to "quickening" was not a crime, on the theory that life began at "quickening." A physician, who helped draft Virginia's 1848 abortion statute, explained its purpose was to supplant this "exploded error":

> "(T)hat the embryo is endowed with an inherent vitality from the first moment of conception, and is therefore as much entitled to the protection of the law before the period of 'quickening' as after it, every well-informed physician must yield a ready assent. The old doctrine, once held by medical men ... that the foetus first becomes animated, or endowed with distinct vitality, at the moment when the sensation of quickening is experienced by the mother, has been long since banished from the domain of science ... and now only finds a retreat in the dark and ancient caverns of the common law.
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> ....
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> "(T)he civil rights of the unborn child are perfect from the very commencement of its being." L.S. Joynes, M.D., "Foetus in Utero," Virginia Medical Journal 179-180, 187 (1856).

The 19th century medical and legal authorities, with none to the contrary, condemned this ancient theory of life:

> "(I)t is the duty of every accoucheur earnestly to protest against the ancient theological and legal opinion that, prior to the fourth month, the embryo had no proper existence.... (T)he merest tyro in physiological investigations must be convinced of the falsity of all such opinions." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 78 (1864).

Yet the Court exactly adopted, as constitutional law, a view of unborn life which the 1860 president of the AMA called "a barbarous physiology" and which courts ruled "never ought to have been the law anywhere,"[13] and which 19th century legislatures condemned as criminal. The AMA president said in urging States to protect all stages of unborn life:

> "This relic of a barbarous physiology needs to be exploded, and the truth should be generally promulgated, that, from the moment of conception, a new being is engendered." 13 Transaction of the American Medical Association 56-57 (1860).

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13. Mills v. Commonwealth, supra, 632.

The abortion statutes were urged by America's most eminent medical professors and physicians, and they were intended to protect all stages of unborn life:

> From the moment of fecundation, the new being becomes independent ... its individuality is complete.... (T)here is a progressive ... advancing from one degree of perfection to another. Every protection, therefore, which is extended by human legislation to the young infant ... should be equally effectual in securing the life of the embryo from the earliest period of its existence.[14]

The abortion statutes show the Constitution's guarantee of life to "any person" was not based on "a barbarous physiology"; the Amendment recognizes that there is no time during unborn life that a rational line can be drawn to permit the killings.

But the Court accepted the medieval view, that life began at "quickening"

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14. H.L. Hodge, M.D., The Principles and Practice of Obstetrics 78 (1864). Hodge's "name had become a household word throughout the land" and his book "valued among the very first works on obstetrics ever issued from the American or foreign press." R. Penrose, M.D., Discourse on Life of H.L. Hodge 20-21 (1872)

(about 4 months), and arbitrarily enlarged it to "viability" (about 7 months), making a "liberty" to kill which even its only authority, the ancient common law, condemned as criminal. Thus the basis of the Court's decree that "the word 'person'... does not include the unborn." This Court's view of constitutional law was founded on medieval medical theory which was rejected as false in the 19th century, and remains false today.

In short, the Court manufactured a constitutional right to kill, out of "an exploded error" that an ante-quick child was not alive, which the "merest tyro" knew to be false, and was universally condemned as "a barbarous physiology" found only in "dark and ancient caverns," which 19th century judges ruled "never ought to have been the law anywhere," and which legislatures condemned as criminal everywhere, in order to Dred Scott-like blast an exception to the Constitution's guarantee of life to

"any person," so tens of millions of victims could be killed with impunity from criminal laws. Such arbitrary shopping among medieval notions, rejected by the framers as "barbarous," in order to define the Constitution's guarantee of life to "any person," is extermination under ruse of law. This precedent can now be evoked by the Court to destroy anyone. Indeed, in defending itself against accusations of murder, this Court has claimed the power to decree the mass murder of Jews, or anybody, to be liberty.[15]

This Court has done the most forbidden thing; it defied the Constitution's guarantee of life to "any person," the two most important words ever written into law, and condemned to death millions of victims whom the Constitution endeavors to preserve. This can now happen to anyone.

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15. See MOTION TO ALLOW COUNSEL TO DEFEND CHILDREN UNBORN AND BORN ALIVE, filed herein, pages 19-23.

E.

In construing its phrase "Everybody has the right to life," the Supreme Court of West Germany ruled the word "everybody" did include the unborn:

> "No distinction can be made among the several stages of developing life before birth, or between prenatal and postnatal life." [Supra page 3 n.3]

The history of the criminal abortion statutes proves the framers of the Fourteenth Amendment made this same conclusion when they universally guaranteed life to "any person" without any exceptions: there is no time during unborn life that the law can withdraw its protection and permit the killings. Rather it is the duty of the law to protect the weak.

Without need of assistance from Chief Justice John Marshall's burdens of proof, as described in the next section, history permits only one rational conclusion: the Constitution's universal guarantee of life to "any person" does include the unborn.

3.

ROE v. WADE CRIMINALLY DEFIED THE CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT DEFIED THE RULINGS OF JOHN MARSHALL AND USED A "GUILTY UNTIL PROVEN INNOCENT" BURDEN OF PROOF TO INFER THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN.

The Court used the correct burden when it previously construed "any person."[1] Yet when it came to the unborn, it used a "guilty until proven innocent" burden.

A.

THE BURDENS, DESCRIBED BY CHIEF JUSTICE MARSHALL, PROVE THE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

Chief Justice John Marshall described the conditions the Court must satisfy to lawfully imply an exception to universal terms in the U.S. Constitution.

Before the Court can exclude the unborn from the Constitution's guarantee of life

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1. The Court properly ruled that the words "any person" included Chinese aliens, saying the words are "universal in their application, to all persons ... without regard to any differences." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). And this Court was so sure that the words "any person" included "corporations," it refused to even allow counsel to argue against it. Santa Clara v. So. Pac. RR, 118 U.S. 394, 396 (1886).

to "any person," so they can be killed with impunity from criminal laws, the Court must prove that including the unborn within the terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application."[2]

The Court must prove that if the right to life of the unborn had "been suggested [to the framers] the language would have been so varied, as to exclude it,"[3] and the

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2. Sturges v. Crowninshield, 4 Wheat. 122, 202-203 (1819). When the Constitution uses universal words, and a case is "within the very words of the Constitution," it would be "dangerous in the extreme" to infer the case "is not within its spirit" because "we believe the framers of that instrument could not intend what they say" unless the "absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

3. Dartmouth College v. Woodward, 4 Wheat. 518, 644-45 (1819). "It is not enough to say that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within

framers would have changed the Fourteenth Amendment to read: "Nor shall any state deprive any person, except unborn persons, of life ... without due process of law."

These are the burdens which protect the lives of all Americans from government sanctioned extermination, as happened in Nazi Germany. The Court bears the heaviest burden of proof to imply an exception to the Constitution's guarantee of life to "any person" so millions of victims can be killed with impunity from criminal laws.[4]

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the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd ... as to justify those who expound the constitution in making it an exception."

The Court used these burdens when it ruled it could not read its jurisdiction, which includes "all cases" arising under the Constitution, as if it merely said "some cases." Cohens v. Virginia, 6 Wheat 264 (1821); Martin v. Hunter's Lessee, 1 Wheat. at 339 (1816).

4. The truth of this extraordinary burden can be demonstrated by applying it to various cases. Before the Court could imply an exception to the universal terms "any person," so that Jews could be deliberately killed with impunity from criminal laws, the Court would have to prove that "the

Chief Justice Marshall's rules prove that the Constitution's guarantee of life to "any person" does include the unborn because "all mankind" would not unite "without hesitation" to exclude them. And the framers would not have changed the Constitution's guarantee to read "any person - except the unborn," so it would be liberty to kill them, because the people had already enacted criminal statutes to protect the lives of the unborn throughout gestation. Thus, under the rulings of Chief Justice John Marshall, the Constitution's universal guarantee of life to "any person" does include the unborn.

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absurdity and injustice" of including Jews within the universal terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." And the Court must prove that if the case of the Jews had been suggested to the framers, they would have changed the Amendment to read: "No state shall deprive any person, except Jews, of life without due process of law." This same burden protects us all.

B.

THIS COURT EXACTLY DEFIED THE BURDEN DESCRIBED BY CHIEF JUSTICE JOHN MARSHALL.

Instead of placing the burden on the advocates of the killings to prove that including the unborn within the guarantee of life to "any person" would "be so monstrous, that all mankind would, without hesitation, unite in rejecting the application," the Court reversed the burden:

First, the Court declared a "liberty" to kill the unborn with impunity from criminal laws, before it even looked to see if the Constitution's guarantee of life to "any person" included the unborn.[5]

Second, subsequently, the Court looked to see if the Constitution's guarantee of life to "any person" included the unborn.[6]

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5. Roe v. Wade, 410 U.S. at 153: "(T)he Fourteenth Amendment's concept of personal liberty ... is broad enough to encompass a woman's decision ... to terminate her pregnancy."

6. Roe v. Wade, 410 U.S. at 156-157. "The appellee ... argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment."

Third, the Court admitted that if the words "any person" included the unborn, its predetermined assertion of a "liberty" to kill the unborn "of course, collapses."[7] But the Court decreed a "liberty" to kill the unborn before it looked to see if the unborn had a "guaranteed" right to live.

Thus the Court had passed its sentence of death, before it even looked to see if the Constitution guaranteed a right to live. It is analogous to a court sentencing an accused to be hung before it even heard the evidence. As Alice's Queen demanded: "Sentence first; verdict afterwards."[8]

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7. Roe v. Wade, 410 U.S. at 156-157: "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."

8. The vengeful Queen in "Alice in Wonderland" shouted "Off with her head" and when admonished that the jury must first consider its verdict, she said: "No! No! Sentence first- verdict afterwards."

So it was in Roe v. Wade - first the sentence of death; then the verdict whether the law allowed the victim to live.

Fourth, the Court's purpose for first predetermining a "liberty" to kill the unborn, was not only to shift the burden of proof from the advocates of the killings onto the unborn, but also to impose its heaviest burden on the unborn, a burden of proof so devastating that state statutes seldom, if ever, survive it.[9]

Fifth, the Court stated that the evidence did not prove "with any assurance" that the guarantee of life to "any person" included the unborn.[10] This confirms that the Court placed the burden on the unborn to prove with "assurance" that the words "any person" included the unborn. This is the heaviest burden which can be imagined.

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9. Roe v. Wade, 410 U.S. at 155: "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'" As its compelling state interest, Texas claimed that the lives of the unborn were protected by the Fourteenth Amendment. Id., at 156.

10. Roe v. Wade, 410 U.S. at 157. "Assurance" means: "To make certain and put beyond doubt." Black's Law Dictionary (4th ed. 1968).

Finally, by calling upon its false evidence to raise trifling doubts, the Court said that the unborn had not met their burden of proof and ruled "the word 'person' ... does not include the unborn."

If the Court used such burdens to decree a "liberty" to kill Jews, surely none would deny it would be murder. Judges may have more sympathy for other victims, but changing the name of the victims will not change the legal result.

When courts use such burdens to condemn victims to death, it can not be pretended that it is still the government of the United States, or any government of Constitution and laws. Yet this Court claims it can use such burdens to exterminate any group of Americans. This is another precedent of murder under ruse of law which can be used to kill anyone. The true burdens prove that the Constitution's guarantee of life to "any person" does include the unborn.

4.

ROE v. WADE CRIMINALLY DEFIED THE CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT USED CRIMINAL PROCEDURES TO CONCLUDE THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN; IT USED THESE PROCEDURES TO MAINTAIN ITS KILLINGS.

Roe v. Wade was a mock trial designed to exclude truth from its proceedings.[1]

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1. A. Denial of Assistance of Counsel
Counsel did not especially represent the unborn in the U.S. District Court in Roe v. Wade. And the U.S. Supreme Court denied a request by an original party to allow counsel to especially represent the unborn and defend their right to life. Thus, counsel did not represent the unborn at any stage of the proceedings in Roe v. Wade.

B. Denial of Prior Notice
The District Court did not even look to see if the lives of the unborn were protected by the U.S. Constitution; this question was argued for the first time after Roe v. Wade reached the Supreme Court. And the Supreme Court gave the parties no prior notice of the constitutional standards, or the burdens of proof, or the evidence, which the Court used to infer that the lives of the unborn were not protected by the U.S. Constitution. The first time the parties had notice was when Roe v. Wade was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn.

C. Secret Evidentiary Proceedings
The Court used some secret evidentiary process, not open to the parties, to find evidence to infer that the Constitution's guarantee of life to "any person" did not

And the Court maintains its killings by using mock trials despite continual objection that the Court used criminal procedures to maintain its killings:

1. The Supreme Court willfully refuses to allow retained (no cost to taxpayers) counsel to represent the victims being killed and defend their right to life.[2]

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include the unborn. An original party objected that the Court's facts were "unknown to the parties" and it never had opportunity to cross-examine the Court's evidence.

D. Denial of Right to Cross-Examine
An original party asked permission to cross-examine the evidence which the Court used to infer that the lives of the unborn were not protected by the Constitution. Since the Court found its evidence in secret proceedings, the parties had not previously seen the evidence. But the Supreme Court would not allow its evidence to be cross-examined.

E. Denial of Right to Present Evidence
An original party asked permission to present evidence under the new constitutional standards, which it had not seen before, to show that the lives of the unborn are protected by the Constitution. But the Court refused to allow it. And after such process the killings commenced.

2. Colautti v. Franklin, 439 U.S. 379, motion to allow counsel for the unborn denied 437 U.S. 902; Anders v. Floyd, 440 U.S. 445, motion to allow counsel for the

2. The Supreme Court willfully refuses to allow its evidence in Roe v. Wade, which it used to infer that "the word 'person'... does not include the unborn," to be confronted and cross-examined.[3]

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unborn denied 439 U.S. 890; Bellotti v. Baird, 443 U.S. 622, motion to allow counsel for the unborn denied 439 U.S. 1065; Ashcroft v. Freiman, affirmed 440 U.S. 941, motion to allow counsel for the unborn denied, 440 U.S. 941; United States v. Zbaraz, 448 U.S. 358, motion to allow counsel for the unborn denied 444 U.S. 1030; Harris v. McRae, 448 U.S. 297, motion to allow counsel for the unborn denied 445 U.S. 941; H.L. v. Matheson, 450 U.S. 398, motion to allow counsel for the unborn denied 445 U.S. 959; Simopoulos v. Virginia, 462 U.S. 506, motion to allow counsel for the unborn denied 458 U.S. 1104; Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476, motion to allow counsel to for the unborn denied 458 U.S. 1104; Akron Center for Reproductive Health v. Akron, 462 U.S. 416, motion to allow counsel to for the unborn denied 458 U.S. 1104; Diamond v. Charles, 476 U.S. 54, motion to allow counsel for the unborn denied 473 U.S. 932; Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, motion to allow counsel for the unborn denied 473 U.S. 931. Later cases are cited in the MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE, filed herein, at page 3 note 2.

3. See cases, supra note 2.

3. The Supreme Court willfully refuses to allow evidence to be presented to show that the Constitution's guarantee of life to "any person" does include the unborn.[4]

These are basically the procedures cited by the Nuremberg Court as part of the evidence to convict the Nazi judges of complicity in extermination and murder.[5]

The Supreme Court's own rulings on due process of law show these procedures to be

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4. See cases, supra note 2.

5. "The trials ... did not approach even a semblance of ... justice. The accused ... were denied the right to introduce evidence, to be confronted by witnesses against them.... They were ... denied the right of counsel of their own choice.... (P)roceedings ... were secret." United States v. Altstoetter, supra, at 1046-47 (1951). "Such a mock trial is not a judicial proceeding but a murder." Id., at 1164. "The prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes." Id., at 1086.

unconstitutional,[6] and the willful use of these procedures to be criminal.[7]

If the Court had used these procedures to decree a "liberty" to kill Jews, it

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6. Even in civil proceedings (such as where loss of welfare is threatened) due process guarantees (1) prior notice of the factual and legal bases; (2) the right to assistance of counsel; (3) the right to cross-examine adverse evidence; and (4) the right to present evidence. Goldberg v. Kelly, 397 U.S. 254, 268-271 (1970). See also, In Re Gault, 387 U.S. 1 (1967).

Could it be possible that procedures, which could not be used to deprive a mother of welfare, could be used to exclude her from the protection of the U.S.Constitution so that she could be killed with impunity from criminal laws? This is preposterous.

The Constitution would not permit any court to condemn even one single Jew to death in a criminal case, but deny any of these procedural rights. Then neither can it permit any court to condemn all Jews in the United States to death, but deny any of these procedural rights, by calling it a civil proceeding, and decreeing the lives of all Jews are not protected by the U.S. Constitution, and it is "liberty" to kill all Jews with impunity from criminal laws.

Any victim is entitled to all the procedural protections before any court can decree that the victim's life is not protected by the Constitution, and the victim can be killed with impunity from criminal statutes.

7. "Even judges ... could be punished criminally for willful deprivations of constitutional rights." Imbler v. Pachtman, 424 U.S. 409 (1976).

surely would be condemned as murder. Judges may have more sympathy for other victims, but changing the names of the victims will not change the legal result.

The Court maintains its decree "MASS MURDER IS LIBERTY" by refusing to allow truth to work in its Court. No truth seeking process is left unbloodied. It is notorious that truth is not permitted to work in this Court, and that the Court falsifies history to achieve its ends.[8]

The record proves the Court used a mock trial without truth to do the most

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8. "The Court ... has flouted the will of the framers and substituted an interpretation in flat contradiction of the original design.... Such conduct impels one to conclude that the Justices are become a law unto themselves.... It perilously resembles ... Hitlerism." R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 408-12 (1977).

"Court had adjourned in the real world and reconvened in Cloud Cuckooland. [The Justices] began to invent a country suited to their purposes.... They have falsified the American past ... and no one in charge seems prepared to do anything about it." T. Landers, To A Traditionalist, Mr. Ron Sounds So Good, Wall St. J., edit. page, Dec. 27, 1984.

forbidden thing, to defy the Constitution's guarantee of life to "any person" so millions of victims could be killed with impunity from criminal statutes. And the Court used mock trials without truth for two decades to maintain its killings. In the words of the Nuremberg court, "Such a mock trial is not a judicial proceeding but a murder."

These procedures are still another precedent of murder under ruse of law which this Court can arbitrarily evoke to destroy anyone. This precedent cancels the Constitution's guarantee of life to "any person" and makes the life of everybody depend on the whim of this Court. Indeed, in defending itself against accusations of mass murder, this Court claimed the power to use such procedures to decree the mass murder of Jews, or anyone, to be liberty.[9]

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9. See MOTION TO ALLOW COUNSEL REPRESENT CHILDREN UNBORN AND BORN ALIVE, filed in this case, and incorporated by reference.

DUE PROCESS OF LAW HAS COMPELLED THE U.S. SUPREME COURT TO CONFESS IN COURT THAT IT IS GUILTY OF MASS MURDER, AND TO ADMIT THAT THE CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

For the 111th time, the U.S. Supreme Court is accused of defying the Constitution's guarantee of life to "any person" and exterminating millions of victims whom the Constitution endeavors to preserve.

For the 87th time, the U.S. Supreme Court is accused of mass murder in violation of state and federal statutes.

For the 91st time, this Court is accused of using criminal procedures to effect and maintain Roe v. Wade killings.

John Marshall would have called Roe v. Wade "treason to the Constitution."[1]

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1. Chief Justice Marshall wrote that this Court could not extend the Constitution "to objects not...contemplated by its framers." Ogden v. Saunders, 12 Wheat. at 332. If the Court usurped such power, it would be "treason to the Constitution." Cohens v. Virginia, 6 Wheat. at 404. By decreeing "liberty" to be the very thing which the framers had condemned to be "murder," the Court has indisputably extended the Constitution to objects not contemplated by its framers. Thus "treason to the

But, for about two decades, the U.S. Supreme Court has never denied the charges, much less attempted to prove the charges to be false.

Under this Court's own rulings, its silence year after year, while the victims are being killed, is an admission that the

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Constitution" has masqueraded as "the supreme law of the land."

The Court supplanted the Constitution as the supreme law. Chief Justice Marshall wrote that "the Constitution derives its whole authority" from the consent of the governed. McCulloch v. Maryland, 4 Wheat. at 403. Yet, the Court now defies this consent; it simply invents a dream world and imposes it on the people by decree. A divided Congress is unable to control this Court, which results in rule by minority.

Thomas Jefferson warned that this Court was "the most dangerous" branch because judges were "installed for life, responsible to no authority (for impeachment is not even a scarecrow)"; that judges twist words to make "anything mean everything or nothing, at pleasure"; that judges "would become despots." This is Roe v. Wade fully explained.

People have lost faith in the simple power of facts to prove: falsehood is called truth; murder is called liberty; treason is called law. This defeat of the consent of the governed as the basis of law is the most momentous revolution in human history. The way out was shown by Abraham Lincoln, who would "call things by their right names, no matter who was offended."

charges are true.[2] In the Court's words:

> "Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question." United States v. Hale, 422 U.S. 171, 176 (1975).

The circumstances leave no doubt that due process has compelled the U.S. Supreme Court to confess that the charges are true.

First, the evidence makes it as clear as daylight why the Court is silent in the

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2. Under the tacit confession rule, failure to deny a charge is admissible as a confession that the charge is true. 4 Wigmore, Evidence, § 1071-1073 (Chadborn rev. 1972). "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick on Evidence, § 161 (1972). This Court has often affirmed this rule. "(T)he Court has consistently recognized that ... silence in the face of accusation is a relevant fact.... Silence is often evidence of the most persuasive character." Baxter v. Palmigiano, 425 U.S. 308, 319 (1976). And the rule is ancient. As Socrates cross-examined at his trial 2400 years ago: "(Y)ou are silent, and have nothing to say. But is not this rather disgraceful, and a very considerable proof of what I was saying?" "I may assume that your silence gives consent." Plato 41, 45 (Jowett tr. 1942).

face of the charges: the charges are proved to be true.[3] Truth cannot be proved false.

Second, the charges were made in cases filed pursuant to the Constitution and laws of the United States. Chief Justice John Marshall ruled that judges who "close their eyes on the Constitution" and "condemn to death those victims whom the Constitution endeavors to preserve" commit "crime."[4]

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3. The Court decreed killings to be "liberty" which States had defined to be "murder." This is mere historical fact; no denial is possible. As John Marshall said, "a fact which has existed cannot be made never to have existed." Marbury v. Madison, 1 Cranch 137, 167 (1803).

4. Marbury v. Madison, 1 Cranch 137, 179-180 (1803). This correctly states the criminal law. Where there is an affirmative duty to act, the deliberate omission to do that duty, which results in death to others, can be prosecuted as homicide. Perkins, Criminal Law 604 (2nd ed. 1969).

The only Nazi to plea guilty at Nuremberg cited this law. When warned of Auschwitz, Speer wrote: "I did not investigate - for I did not want to know what was happening there.... From fear of discovering something which might have made me turn from my course, I closed my eyes." A. Speer, Inside the Third Reich 375-76 (1970). This "deliberate blindness" is complicity in criminal extermination.

The Court had a legal duty to fully hear allegations that Roe v. Wade was wrongly decided. The Court affirmed its duty:

> "(I)ts opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." The Passenger Cases, 7 How. 282, 470 (1849).

Third, the Court's steadfast silence for two decades in the face of the scores of accusations is unparalleled in the legal history of the world; the Court cited this very circumstance as making confession by silence more trustworthy.

> "Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation." United States v. Hale, 422 U.S. 171, 176 (1975).

Fourth, not only has the Court's silence persisted in the face of repeated accusations, but it has persisted even in the teeth of warnings that its silence was

being taken as an admission that the charges are true.

Fifth, the charges described judicial crimes not surpassed in all history, that (1) judges had done the most forbidden thing, and defied the Constitution's guarantee of life to "any person," the two most important words ever written into law, and criminally exterminated millions of children; (2) the United States was being ruled by the most corrupt decree which the human mind could even imagine: "MASS MURDER IS LIBERTY"; (3) due process of law had compelled the judges to confess to guilt of mass murder; and (4) the judges schemed to reaffirm the legitimacy of their murders in mock trials designed to keep truth from working in all state and federal courts.[5]

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5. A typical example was Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), where the Court reaffirmed Roe v. Wade by stare decisis in another mock trial designed to suppress truth.

The parties did not ask the Court to overrule Roe v. Wade. This was done by the amicus curiae brief by the Legal Defense

The United States being ruled by a giant conspiracy to kill children in violation of murder statutes, under the decree MASS MURDER IS LIBERTY, is the most catastrophic crime in the history of civilization which reduces government to

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Fund for Unborn Children, as follows: "For the 52nd time, the U.S. Supreme Court is accused in its own court with mass murder." The amicus brief laid out the evidence, and concluded: "THE U.S. SUPREME COURT HAS CONFESSED IN COURT TO GUILT OF CRIMINAL EXTERMINATION, INCLUDING MASS MURDER, AND THIS IS THE LEGAL EQUIVALENT OF THE EXPRESS OVERRULING OF ROE v. WADE." But this Court responded to these arguments by saying:

> And arguments continue to be made, in these cases as well, that we erred in interpreting the Constitution. Nonetheless, the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm Roe v. Wade.

Thus, the Court's response to "arguments" that it was guilty of mass murder. When a court rules that its decree "MASS MURDER IS LIBERTY" must be obeyed without a hearing or even a question, then history could not reveal a more murderous mockery of "the rule of law." The Court hid behind "stare decisis" in a mock trial to suppress truth and defraud all lower courts into obeying Roe v. Wade without question.

the mere matter of which murderer can grab power and be obeyed.

Never was it more imperative to deny charges if they were untrue. Judges, under solemn legal duty to uphold the law, are accused of mass murder. The evidence is laid out in court. The judges have done the most forbidden thing, and defied the Constitution's universal guarantee of life to "any person." Children are being killed in defiance of murder statutes. Pictures of the dead are shown to the judges. But for about two decades, the judges do not meet the evidence; they do not prove the charges to be false.

A government of laws can permit only one conclusion to be drawn from these facts: The U.S. Supreme Court was met in court with the truth; truth worked in the only manner in which it was permitted to work; and due process of law compelled this Court to admit that the charges are true.

Any judge who closes his eyes on these

facts, and chooses to take part in a national scheme to kill little children, in defiance of the guarantee of life to "any person," and criminal statutes, to maintain the decree "MASS MURDER IS LIBERTY," knows he is guilty of complicity in mass murder and criminal defiance of the Constitution.[6]

In explaining how the Nazi Regime got

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6. Roe v. Wade asserted to legalize killings which statutes had made criminal. Since Roe v. Wade is a mistake of law, all the killings since 1973 can be prosecuted.

The ex post facto provisions of the U.S. Constitution do not apply to judicial decisions which are a mistake of law. Ross v. Oregon, 227 U.S. 150, 161 (1912).

The general rule is that mistake of law is no excuse for breaking the law. R. Perkins, Criminal Law 920 (2d ed. 1969).

The limited affirmative defense of reasonable reliance on an official judicial opinion, thereafter determined to be a mistake of law, does not apply to homicide cases. Model Penal Code, Tentative Draft No. 4, Comments Sec. 2.04, page 138; R. Perkins, Criminal Law 928 (2d ed. 1969).

Thus, the law applied at Nuremberg applies to this case. Obedience to the orders of judicial superiors is no excuse for complicity in murder. United States v. Altstoetter, supra, at 983-985.

Perhaps judges responsible for the Roe v. Wade murders did not believe they were breaking the law. But as Oliver Wendell Holmes wrote: "Ignorance of the law is no excuse for breaking it.... It is no doubt true that there are many cases in which the

away with its monstrous crimes, Winston Churchill quoted Machiavelli: "Men avenge slight injuries, but not grave ones." The Court knows that truth well; the legal foundation of the United States now rests on the assumption that the gravest crime in history cannot be avenged.

The photo on the last page shows a second stage abortion under Roe v. Wade. If the child were born alive, this Court would be guilty of murder. If the child were born dead, this Court would be guilty of

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criminal could not have known that he was breaking the law, but ... the lawmaker has determined to make men know and obey." O.W. Holmes, The Common Law 41 (1963).

Even if the Supreme Court held a gun to the head of a lower judge, and threatened death unless he obeyed Roe v. Wade, it would not be a defense to murder, for "he ought rather to die himself than escape by the murder of an innocent." 4 Bl. Com. 30.

The law makes a mortal distinction between killing and not killing: (1) any judge who stopped the Roe v. Wade killings, and made a mistake of law, could only be overruled on appeal; (2) but any judge who allows the killings to continue and makes a mistake of law, can be convicted of murder, and be sentenced to death. The law of capital murder is a hard school, where lessons are taught only one time, and mistakes of law are not forgiven.

extermination under 18 U.S.C. § 242.

Truth has worked in this Court; judges cannot stop it. Due process has compelled this Court to admit that the Constitution's universal guarantee of life to "any person" does include the unborn.

CONCLUSION

Merely overruling Roe v. Wade will simply continue its crimes, perhaps on a less extensive scale. The Court misguided this nation and the entire world.

Now the Court must promulgate the truth, that the universal guarantee of life to "any person," made in the Fifth and Fourteenth Amendments of the Constitution, does include the unborn. States have a duty to protect unborn life.

Alan Ernest
Counsel

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No. 92-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

Supreme Court, U.S.
FILED
AUG 13 1993
OFFICE OF THE CLERK

NATIONAL ORGANIZATION FOR WOMEN, *et al.*,

Petitioners,

—v.—

JOSEPH SCHEIDLER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF NOW LEGAL DEFENSE AND EDUCATION FUND, AMERICAN HUMANIST ASSOCIATION, AMERICAN JEWISH COMMITTEE, AMERICAN MEDICAL WOMEN'S ASSOCIATION, INC., AMERICANS FOR RELIGIOUS LIBERTY, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, B'NAI B'RITH WOMEN, CALIFORNIA WOMAN LAWYERS, CHICAGO ABORTION FUND, FEMINIST MAJORITY FOUNDATION, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, METHODIST FEDERATION FOR SOCIAL ACTION, NATIONAL ABORTION RIGHTS ACTION LEAGUE, NATIONAL BLACK WOMEN'S HEALTH PROJECT, NATIONAL FEDERATION OF TEMPLE SISTERHOODS, NATIONAL WOMEN'S LAW CENTER, NORTHWEST WOMEN'S LAW CENTER, UNION OF AMERICAN HEBREW CONGREGATIONS, UNITARIAN UNIVERSALIST ASSOCIATION, UNITED SYNAGOGUE OF CONSERVATIVE JUDAISM, VOTERS FOR CHOICE, WOMEN EMPLOYED, WOMEN'S EQUAL RIGHTS LEGAL DEFENSE AND EDUCATION FUND, WOMEN'S LAW CENTER, WOMEN'S LAW PROJECT, WOMEN'S LEGAL DEFENSE FUND, YWCA OF THE U.S.A., *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

DEBORAH A. ELLIS
BURT NEUBORNE
NOW LEGAL DEFENSE AND EDUCATION FUND
99 Hudson Street
New York, New York 10013
(212) 925-6635

DAVID I. GOLDBLATT
Counsel of Record
CHARLES S. SIMS
HARRY W. LIPMAN
PROSKAUER ROSE GOETZ & MENDELSOHN
1585 Broadway
New York, New York 10036
(212) 969-3000

Attorneys for Amici Curiae

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The Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968 . . . . . *passim*

INTEREST OF *AMICI CURIAE*

This brief supporting the petitioners is filed, with the consent of the parties, on behalf of a wide range of organizations and their members. The specific interests of each *amicus* (described more fully in the Appendix, *infra*) differ, but all *amici* share a commitment to protecting the civil rights of women under law.

This case is of special importance to *amici* because it tests whether an important protection afforded by Congress will be denied to women by the imposition of a non-text-based requirement that renders RICO powerless to protect targets of sustained political terrorism. The violent methods of Operation Rescue, used today to deprive women and those who help women of constitutional and other valuable rights, can be used tomorrow against any of us.

SUMMARY OF ARGUMENT

The plain language of RICO lacks an economic motive requirement, and there is no basis for judicially imposing one. This Court's recent precedents have consistently rejected constructions of RICO that, like defendants' reading here, lack a textual basis. If RICO does require economic motive, it is present here because defendants have intentionally inflicted widespread and severe economic injury on their victims. There is no reason to believe that Congress intended to exclude political terrorism from RICO's broad coverage.

Application of RICO as written to defendants' repeated and continuous commission of violent, criminal acts does not pose a threat to the continuation of this nation's important tradition of protest and civil disobedience. RICO does not, and constitutionally could not, proscribe expressive conduct protected by the First Amendment. Nor is the non-violent civil disobedience which has characterized great movements for social change, such as that engaged in by Dr. Martin Luther King, threatened by RICO; while such bearing of moral witness may be unlawful, it does not constitute the kinds of serious crimes that are predicate acts under RICO. What RICO does threaten, and appropriately so, is the systematic commission of

criminal acts of violence and intimidation such as those engaged in by the defendants in this case.

ARGUMENT

I. NO BASIS EXISTS TO IMPOSE A JUDGE-MADE REQUIREMENT OF ECONOMIC MOTIVE ON THE PLAIN LANGUAGE OF RICO. IF, HOWEVER, A REQUIREMENT OF ECONOMIC MOTIVE EXISTS UNDER RICO, IT IS SATISFIED BY DEFENDANTS' AVOWED DESIRE TO INFLICT ECONOMIC INJURY ON THEIR VICTIMS

A. No Requirement Of Economic Motive Exists Under RICO

The Racketeer Influenced and Corrupt Organizations Act (RICO)[1] is premised on Congress' recognition that organized combinations of lawbreakers pose a unique threat to the rule of law.[2] Accordingly, RICO weaves multiple acts of organized lawlessness,

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[1] Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968 (1993).

[2] Anglo-American law has long recognized that concerted criminal activity is more dangerous than the same activity committed by individuals. *Iannelli v. United States*, 420 U.S. 770, 778 (1975) (Powell, J.) ("[C]ollective criminal agreement--partnership in crime--presents a greater potential threat to the public than individual delicts.") (*quoting Callanan v. United States*, 364 U.S. 587, 593 (1961)). The aggravated risks posed by concerted action were analyzed by Justice Frankfurter in *Callanan*, 364 U.S. at 593 (concerted criminality affords greater chance of success in carrying out a planned offense, makes abandonment of the offense less likely, allows attainment of more complex criminal ends, and creates a greater chance of committing further, unrelated crimes).

committed as part of a pattern involving an "enterprise", into a single federal offense subject to substantial criminal and civil sanctions.[3]

In this case, plaintiffs allege that the named defendants formed and used an "enterprise" to facilitate the commission of a pattern of unlawful acts against women's health clinics and women seeking to exercise their constitutional right to terminate a pregnancy.[4] Despite Congress' use of broad, functionally descriptive language in RICO, the court below superimposed a non-textual requirement that the multiple acts of lawlessness covered by RICO must be motivated by a desire for economic gain.[5] *National Organization for Women Inc.*

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[3] Prior to RICO, American courts had traditionally treated multiple violations of law in splendid isolation from one another. *See People v. Zackowitz*, 254 N.Y. 192, 172 N.E. 466 (1930); *Fed. R. Evid.* 404(b).

[4] In the scenario envisioned by 18 U.S.C. §§ 1962(a) and (b) (1984), it is an "enterprise" as victim that provides the common denominator linking a pattern of lawless acts into a cognizable whole. *E.g.*, *United States v. Jacobson*, 691 F.2d 110, 111-12 (2d Cir. 1982); *United States v. Gambino*, 566 F.2d 414 (2d Cir. 1977), *cert. denied*, 435 U.S. 952 (1978). In the § 1962(c) scenario invoked by plaintiffs, it is an "enterprise" as predator that provides the common thread binding a pattern of lawlessness into a single offense. *E.g.*, *United States v. Turkette*, 452 U.S. 576 (1981); *Russello v. United States*, 464 U.S. 16 (1983). *See Reves v. Ernst & Young*, __U.S.__, 113 S. Ct. 1163 (1993).

[5] The paradigm of an organized combination of lawbreakers acting through systematic violation of law is the Mafia. Not surprisingly, the permutations envisioned in §§ 1962(a), (b) and (c), cover the characteristic behavior of organized crime. But the 1970 Congress did not merely outlaw the Mafia, both because it is impossible to draft a statute aimed solely at membership in a shadowy, wholly unlawful organization; and because the characteristic behavior of organized crime — systematic violation of law by an organized combination of lawbreakers — poses a serious threat to the rule of law no matter who the lawbreakers may be. Instead, Congress outlawed the Mafia's modes

(continued...)

v. Scheidler, 968 F.2d 612 (7th Cir. 1992). But see *Northeast Women's Center v. McMonagle*, 868 F.2d 1342 (3rd Cir.), cert. denied, 493 U.S. 901 (1989) (rejecting requirement of economic motivation).[6]

This Court has repeatedly rejected similar efforts to impose judge-made restrictions on the plain language of RICO. In *United States v. Turkette*, 452 U.S. 576 (1981), this Court upheld the application of RICO to an arson ring, rejecting a non-textual effort to limit "enterprise" in § 1962(c) to the type of victim-enterprise contemplated in §§ 1962(a) and (b) (1984). In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), this Court rejected a non-textual effort to limit RICO liability to conduct resulting in criminal convictions. The *Sedima* Court rejected, as well, a non-textual effort to require a separate "racketeering injury" over and above the harms caused by defendants' acts of systematic lawlessness. In *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), this Court rejected a non-textual effort to require that the pattern of lawless behavior underlying RICO involve separate illegal schemes.[7] Most recently,

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[5](...continued)
of operation. Under RICO, therefore, "organized crime is as organized crime does." Gerard E. Lynch, *RICO: The Crime of Being a Criminal Pts. 1 & 2*, 87 Colum. L. Rev. 661, 687 (1987).

[6] *See also United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983) (requiring economic motivation); *Feminist Women's Health Center v. Roberts*, 1989 U.S. Dist. LEXIS 5837 (W.D. Wash. 1989) (rejecting requirement of economic motivation). *See generally* Note, *The Use of Civil RICO Against Antiabortion Protestors and the Economic Motive Requirement*, 90 Colum. L. Rev. 1341 (1990); Note, *Civil Disobedience and Civil RICO: Anti-Abortionists as Racketeers*, 93 W. Va. L. Rev. 359 (1991).

[7] Consistent with RICO's text and purpose, the *H.J.* Court stressed that the requisite RICO pattern of lawlessness must "show that the racketeering predicates are related, *and* that they amount to or pose a (continued...)

in *Reves v. Ernst & Young*, ___ U.S. ___, 113 S. Ct. 1163 (1993), this Court construed § 1962(c) to require that a RICO defendant play some part in directing the enterprise's affairs, rejecting a non-textual requirement of "significant control" over the enterprise. *Id.* at 1170, n.4.

Two themes emerge from the Court's RICO cases: (1) strict fidelity to the Congressional text; and (2) sympathetic understanding that Congress intended RICO to provide broad federal protection against organized lawlessness. The lower court's effort to create an implied exception to RICO for politically motivated lawlessness ignores the Congressional text, the purpose of RICO and the relevant precedents of this Court.

No textual support exists for the imposition of a requirement of economic motive in a RICO case. The key definitions of "enterprise" and "pattern of racketeering activity" in 18 U.S.C. § 1961 make no distinction between lawlessness motivated by greed and identical patterns of lawlessness motivated by hatred, misplaced idealism or some other "non-economic" motive. The operative imposition of criminal and civil liability in §§ 1962 and 1964 likewise give no hint of distinguishing between "economic" and "non-economic" crimes.[8]

Nor is there any validity to defendants' argument that Congress' use of the term "enterprise" connotes a requirement of

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[7](...continued)
threat of continued criminal activity." 492 U.S. at 239 (emphasis in original).

[8] 18 U.S.C. § 1964(c) does require that a plaintiff be injured in her "business or property" by the defendants' pattern of lawlessness in order to invoke civil RICO. But § 1964(c) simply defines the harm civil RICO is designed to redress. It has nothing to do with the motive underlying defendants' acts. As the recent bombing of the World Trade Center in New York City illustrates, politically motivated terrorism can have devastating economic consequences.

economic motive. As defined in 18 U.S.C. § 1961(4),[9] "enterprise" is far broader than an economic combination. While the term "enterprise" as used in §§ 1962(a) and (b) will often — but not always — be an economic entity because of its status as victim or target,[10] the role played by a predator-enterprise under § 1962(c) has no intrinsic connection with commerce. Indeed, the worldwide resurgence of political, racial, religious and ethnic terrorism makes it painfully clear that the threat to the rule of law posed by organized combinations of lawbreakers is not confined to the economic sphere. If anything, Congress' perception in 1970 and again in 1984 of the inadequacy of a purely "transactional"[11] approach to patterns of lawlessness is most compelling in the area of political terrorism.

Finally, similar efforts to invent non-textual statutory exemptions based on an illusory distinction between "political" and "economic" motivation have been uniformly rejected by this Court, most tellingly in the context of the anti-trust laws, the conceded model for RICO. In *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), this Court explicitly rejected the argument that

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[9] Section 1961(4) defines an enterprise as:

> ... any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact though not a legal entity.

[10] Both the court below and the Second Circuit in *United States v. Ivic*, *supra*, appear to have ignored the fact that non-economic entities like political parties and churches might be the target of systematic lawless activity in violation of § 1962(b) with no economic motive. Patterns of lawlessness may be directed against churches, political parties and entire communities as victim-enterprises in order to silence or terrorize them. Kristallnacht was not designed to make a profit.

[11] The term "transactional" to describe the treatment of multiple violations of law as wholly independent events is drawn from Gerard E. Lynch, *RICO: The Crime of Being A Criminal, Pts. 3 & 4*, 87 Colum. L. Rev. 920, 932-37 (1987).

a horizontal price-fixing conspiracy was outside the purview of the anti-trust laws because the participant lawyers were motivated by a desire to protect their clients' constitutional rights. In *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938), this Court rejected an effort to distinguish between "economically" and "politically" motivated labor picketing, holding that picketing by "outsiders" seeking to induce an employer to hire black workers was fully protected by the Clayton and Norris-LaGuardia Acts. *New Negro Alliance* was reaffirmed in *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702 (1982), where this Court held once again that the existence of a political motive does not remove a labor dispute from the Norris-LaGuardia Act's gloss on the Clayton Act's labor exemption. Finally, in *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982), the Court unanimously rejected an effort to distinguish between secondary boycotts on the basis of "economic" and "political" motivation.

B. If A Requirement Of Economic Motive Exists Under RICO, It Is Satisfied By Defendants' Conceded Desire To Inflict Economic Harm On The Targets Of Their Lawless Acts

The court below insisted not only that defendants be shown to have acted with an economic motive, but also that the economic motive must be the acquisition of gain, not the intentional infliction of loss. *National Organization of Women Inc. v. Scheidler*, 968 F.2d 612, 629 (7th Cir. 1992). Since no textual basis exists for the imposition of *any* economic motive requirement, there is certainly no support in the statute for insisting that the motive be economic gain rather than the infliction of economic loss. There is nothing in the text or the legislative history of RICO to suggest that Congress wished to provide a remedy against systematic lawlessness motivated by greed, but no remedy for the identical lawless behavior causing the identical economic injury motivated by hatred or misplaced idealism.

Here, defendants' clear and unmistakable motive to cause economic loss is not in dispute. Defendants make no effort to conceal their desire to inflict economic injury on the targets of their repeated lawlessness. For example, defendant Scheidler concedes that ". . . the activities and methods proposed in this book are *intended* to interfere with and even stop the business of abortion . . . ." Joseph M. Scheidler, *Closed: 99 Ways to Stop Abortion* 18 (1985) (emphasis in original).[12] Most obviously, defendants' aim is to drive abortion clinics out of business. Since free-standing clinics provide inexpensive abortions, closing clinics would mean not only that fewer facilities would provide abortions, but also that the price of abortions would rise beyond the means of millions of women. JA 42, 46, 53.

To accomplish these ends, the defendants use numerous unlawful tactics including bombing and arson, physical destruction of property, forcible unlawful entry, physically blockading and assaulting clinic employees and clients as they enter or exit the clinics, lock and block (individuals locking themselves to cement blocks), and gluing clinic door locks to prevent entry. JA 39-40, 50, 53-55, 95, 118-97. These tactics are designed to compel clinics to close by forcibly preventing women from keeping appointments and by intimidating women from doing business with the clinics in the future. JA 49, 55.[13]

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[12] More recently, the National Director of Operation Rescue National testified before Congress, "My desire would be to see abortion clinics stopped, closed." *Freedom of Access to Clinic Entrances Act of 1993*, S. Rep. No. 117, 103d Cong., 1st Sess. 11 (1993) [hereinafter Senate Report].

[13] For example, in an attempt to force clinics to close, defendants engaged in four months of systematic actions in Atlanta, Georgia, in 1988, resulting in over 1,200 arrests. The defendants assaulted police officers and committed acts of false imprisonment and trespass. JA 56. The conspirators' violence and criminal conduct are further illustrated by the acts of co-conspirator John Burt, who led the action at the Ladies Center

(continued...)

Even when defendants are unable to close a free-standing abortion clinic permanently, they admit that their unlawful acts are designed to disrupt a clinic's operations,[14] intentionally inflicting economic injury both on the clinic and on women seeking an inexpensive abortion. The defendants' actions in this case are part of a national conspiracy directed at women, doctors and clinics.[15] Records of the National Abortion Federation show that between 1990 and June 1993, there have been 595 acts of violence at abortion and pregnancy health care clinics.[16]

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[13](...continued)
in Pensacola, Florida, which immediately preceded the tragic murder of Dr. David Gunn on March 10, 1993. Burt was known to be violent. During a 1986 siege of the same clinic, he injured two women and along with a companion destroyed medical equipment and other property. He had to be restrained from further violence by the police and was later convicted on criminal charges stemming from those actions. JA 50-52.

[14] Defendant Terry's book instructs followers in the ways clinic operations are most effectively interrupted. He exhorts readers to answer a "higher law" by "enter[ing] procedure rooms...[and] lock[ing] themselves in." He also urges them to arrive at the clinic before it opens and "block the door with their bodies, their cars, or special locks, so that no one can get in. It can be quite exciting...." He writes, "Sometimes it takes the police hours to remove the rescuers. No children will be killed during that time. Sometimes the abortuary will close for the whole day." Randall A. Terry, *Operation Rescue* 124 (1988). *See also* Joseph M. Scheidler, *Closed: 99 Ways to Stop Abortion* 214-216 (1985).

[15] In her testimony before the Senate Labor and Human Resources Committee concerning the Freedom of Access to Clinic Entrances Act of 1993, Attorney General Reno addressed the national character of the defendants' violence and organization: "This is a problem that is national in scope. It is occurring throughout the country...." Senate Report, *supra* note 12, at 12.

[16] National Abortion Federation, *Incidents of Violence & Disruption Against Abortion Providers* (1993). For the period between January
(continued...)

These violent acts have a disproportionate economic effect on low-income women because low-income women are more likely to use clinics than are other women.[17] The blockading and closing of clinics deny access to low-income women seeking inexpensive abortions and deprive these women of other low-cost reproductive health care. In the absence of clinics, low-income women must seek care in private physicians' offices at considerably higher costs or rely on services provided by public hospitals.[18] Low-income women are, however, unlikely to be able to afford private medical assistance because they are not likely to be covered by either public or private insurance.[19] Although most reproductive health care is provided by private physicians, low-income women cannot reasonably rely on

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[16](...continued)
1990 and June 25, 1993, the report documents 2 clinic bombings, 35 incidents of arson at clinics, and 18 attempted bombings or arsons. *Id.*

[17] Jacqueline A. Horton, *The Women's Health Data Book: A Profile of Women's Health in the United States* 100 (1992).

[18] Charges for an abortion performed in a hospital are up to seven times higher than one performed in an abortion clinic. *Id.* at 100. Moreover, many hospitals do not provide abortions; a 1988 study indicates that of the country's 5,533 short term general hospitals only 19% provide abortions. The number of abortion providers has consistently declined since 1985 and nonsecular hospital providers have led the decline. Stanley K. Henshaw, *Abortion Services in the United States, 1987 and 1988, in Abortion Medicine And The Law* 482, 494 (J. Douglas Butler, David F. Walbert eds., 1990).

[19] Public Health Service, U.S. Department of Health and Human Services, *Health Status of Minorities and Low Income Groups: Third Edition* 99 (1991).

private physicians for reproductive health care because of high costs and lack of insurance coverage.[20]

For low-income women who are eventually able to use the clinics' services, notwithstanding defendants' efforts to impede them, the defendants' actions greatly increase the costs of such services and their related expenses. Already, women seeking abortions often must travel great distances to obtain necessary services because 83% of all counties in the United States are without abortion providers.[21] The defendants' conspiracy limits access even more. When clinics are closed or their business curtailed, women must reschedule appointments or accept referrals to distant clinics. Being forced to return to clinics a second and third time imposes devastating economic consequences on women who cannot afford another day of lost wages; cannot afford another day of child care; and cannot afford the transportation, lodging, and meal costs of repeating the often

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[20] Women relying on Medicaid are hampered by the fact that many physicians do not accept publicly insured patients. One study shows that only 22,000 out of 34,000 office-based physicians providing obstetric, gynecological or general family care accept Medicaid. The Alan Guttmacher Institute, *Prenatal Care in the United States: A State and County Inventory* 63 (1989).

[21] Stanley K. Henshaw and Jennifer Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 Family Planning Perspectives 102, 106-07 (May/June 1990).

The circumstances for women seeking second or third trimester abortions are even more difficult. Only a small number of clinics provide abortion services after the first trimester. Only 13% of all physicians who perform abortions will do so after the 12th week and fewer still provide care after the 16th week of gestation. *See* Council on Scientific Affairs, American Medical Association, *Induced Termination of Pregnancy Before and After Roe v. Wade; Trends in the Mortality and Morbidity of Women*, 268 Journal of the American Medical Association, 3231, 3238 (1992) [hereinafter Council on Scientific Affairs].

excruciating trip of hundreds of miles to reach the clinic.[22] Once a woman has missed her scheduled appointment, she may not be able to make arrangements for another appointment for weeks, a delay that increases the risk of complications and therefore costs.[23] When this delay results in women being forced to undergo second trimester abortions, there are increased medical risks[24] and costs[25] and a

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[22] Horton, *supra* note 17, at 101 (33% of all abortions are performed outside of the woman's county of residence; 18% of women seeking abortion were forced to travel over 50 miles; 9% of these women traveled over 100 miles to secure care).

[23] *See* Council on Scientific Affairs at 3238 ("Anything that delays the [abortion] procedure increases the costs incurred, decreases providers' willingness to perform the abortion, and increases the health risks associated with the procedure").

Procedures performed at 11-12 weeks are three times more dangerous than abortions performed at or before 8 weeks. Stanley K. Henshaw, *Induced Abortion: A World Review, 1990, in Abortion, Medicine, And The Law* (J. Douglas Butler, David F. Walbert eds., 1990).

[24] The usual procedure for a second trimester abortion includes a series of injections and the insertion of pre-abortion laminaria to cause cervical dilation. The laminaria is removed after a 12-24 hour period. Each step of the procedure requires the presence of a doctor, other trained personnel and medical supplies and equipment. Delay in removal of the laminaria creates a serious potential for infection and hemorrhaging. William Cates Jr., *et al.*, *Dilatation and Evacuation Procedures and Second-Trimester Abortions; The Role of Physician Skill and Hospital Setting*, 248 Journal Of the American Medical Association 559, 560 (1982); Senate Report, *supra* note 12, at 15-16.

[25] On average, an abortion performed at a clinic at 10 weeks costs $245; at 16 weeks it costs $509; at 20 weeks it costs $897. Horton, *supra* note 17, at 100.

The increased cost of second trimester abortions also limits the ability of private funding to assist women with the cost of necessary health care. Organizations such as the Chicago Abortion Fund ("CAF"), one

(continued...)

longer period of recuperation, which increases the costs of lost wages and child and family care.

The economic harm resulting from clinic blockades and forced closures also affects low-income women harshly because of state and federal restrictions on Medicaid funding. Only twelve states provide Medicaid funding for abortions of pregnancies not resulting from rape or incest or that involve health conditions that threaten the life of the mother.[26] The cost of an abortion is a significant burden for low-income women, taxing already limited resources. Women must often decide whether to obtain abortion or use their funds for other necessities.

Defendants' tactics also prevent low-income women of all ages from receiving other crucial medical services, because many clinics targeted by defendants, including the named plaintiff clinics, offer an array of gynecological health services. Such clinics may be the only available sites offering low-cost mammography, family planning, preventive cancer screening, and sexually transmitted disease testing. JA 41-42.[27] The defendants' violent conduct thus

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[25](...continued)
of the *amici* here, are dedicated to aiding women financially with health care needs. When CAF and similar private funders are forced to assist with the higher costs of second trimester abortions, they are able to help fewer women. Thus, more low-income women are forced to pay the full costs of abortion services, precluding abortion as a realistic reproductive choice for many women.

[26] National Abortion Rights Action League Foundation, *Who Decides? A State-by-State Review of Abortion Rights* 145 (4th ed. 1993). States providing Medicaid funding for abortions are: Alaska, California, Connecticut, Hawaii, Massachusetts, New Jersey, New York, North Carolina, Oregon, Vermont, Washington, and West Virginia. *Id.*

[27] Almost all facilities that perform abortions provide other medical services, including contraceptive care, gynecologic care, STD treatment, (continued...)

results in economic harm to low-income women and restricts critically needed health care for this vulnerable community.

Lacking support in text, policy or precedent, the effort to graft a requirement of economic motive onto the plain language of RICO should be rejected. However, if an economic motive is required, it is plainly satisfied here by the economic harm intentionally visited upon women by defendants' lawlessness.

II. APPLICATION OF RICO TO ACTORS WITH NO OVERRIDING ECONOMIC MOTIVE DOES NOT POSE A THREAT TO THE CONTINUATION OF THIS NATION'S IMPORTANT TRADITION OF PROTEST AND CIVIL DISOBEDIENCE

In an attempt to avoid the plain language of RICO, defendants contend that RICO would pose a threat to this nation's important tradition of protest and dissent if it is construed to reach defendants' unlawful conduct.[28] Defendants not only disingenuously characterize their own protest methods as akin to those employed by certain significant protest movements, but they also appear seriously to misunderstand our nation's tradition of protest and civil disobedience.

Applied as written to defendants' repeated and continuous acts of violence and intimidation, RICO does not impinge on First Amendment activity. There is no reason to construe RICO more narrowly than its plain language in order to avoid constitutional

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[27](...continued)
obstetric care, HIV testing, infertility services, and general medical care. Stanley K. Henshaw, *The Accessibility of Abortion Services in the United States*, 23 Family Planning Perspectives 246, 247 (November/December 1991).

[28] *See* Brief of Respondents Joseph M. Scheidler, Timothy Murphy, Andrew Scholberg, and the Pro-Life Action League, Inc. in Opposition to Petition for Writ of Certiorari, at 6-8.

difficulties. *See, e.g., NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). Unlike either the constitutionally protected expressive conduct that has characterized the bulk of social and political protest activity, or civil disobedience — the unprotected but non-violent conduct traditionally subject to relatively minor sanctions — defendants' conduct subject to RICO is wholly unprotected and extremely harmful. It falls into a third category, marked by highly organized acts of violence and intimidation, and thus deserves neither protection nor toleration.

A. RICO Poses No Threat To Protected Speech

Expression regarding issues of public concern "has always rested on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982), *quoting Carey v. Brown*, 447 U.S. 455, 467 (1980). Accordingly, picketing, leafletting, public demonstration, and marches — conduct historically engaged in by social and political movements in an effort to challenge and change the laws and mores of our society — have all enjoyed constitutional immunity from government sanction or censure. *See, e.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). Indeed, the First Amendment protects even the most repugnant and offensive speech. *See Texas v. Johnson*, 491 U.S. 397 (1989); *Cohen v. California*, 403 U.S. 15 (1971); *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

RICO represents no threat to activity historically associated with the exercise of free speech and peaceful assembly, because such protected activity is not "chargeable," "indictable" or otherwise included in the definition of "racketeering activity" under 18 U.S.C. § 1961(1). For the same reason, RICO does not chill potential First Amendment demonstrators by instilling fear that the unlawful acts of others might trigger vicarious RICO liability. Protest organizations and their members who do not commit or agree to commit certain serious federal crimes, *e.g.*, wire fraud, mail fraud, bankruptcy fraud, securities fraud, and Hobbs Act extortion, or serious state crimes

involving murder, arson, extortion, bribery and the like (18 U.S.C. § 1961(1)), can have no liability under RICO. For, in order to establish RICO liability under § 1962(c), a plaintiff must plead and prove that each defendant conducted or participated in an enterprise through a pattern of racketeering activity. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985); *Reves v. Ernst & Young*, ___ U.S. ___, 113 S. Ct. 1163, 1169 (1993); *cf. Beauford v. Helmsley*, 865 F.2d 1386, 1391 (2d Cir.), *vacated*, 492 U.S. 914, *adhered to*, 893 F.2d 1433 (2d Cir.), *cert. denied*, 493 U.S. 992 (1989) (isolated or sporadic acts do not satisfy the pattern requirement). That RICO has been applied against Operation Rescue but not against the National Conference of Catholic Bishops is no accident but a function of the two organizations' substantially different methods of dissent.

Courts confronted with RICO-based anti-abortion protest cases have consistently guarded against any intrusions of RICO into activity protected by the First Amendment, without having to depart from the plain statutory language. *See Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1349 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989) (approving the following charge to the jury):

> The First Amendment of the United States Constitution guarantees the defendants a right to express their views. The defendants have a constitutional right to attempt to persuade the Northeast Women's Center to stop performing abortions. They have a constitutional right to attempt to persuade the Center's employees to stop working there and they have a constitutional right to attempt to persuade the Center's patients not to have abortions there. . . . The mere fact, also, that the defendants or some of their protests may be coercive or offensive, does not diminish the First Amendment right to a protest.

Even in its conspiracy provision, 18 U.S.C. § 1962(d), RICO requires that each defendant at the very least agree to commit a

§ 1962 violation.[29] Thus, the statute closely follows the First Amendment requirement that a defendant must be an active participant in an unlawful association, with a specific intent to further its unlawful ends, before being held responsible for its misdeeds. *Noto v. United States*, 367 U.S. 290 (1961); *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298 (1957); *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).

For similar reasons, RICO does not destroy the careful distinction made in *NAACP v. Claiborne Hardware* between protected speech and violent action. *See Wisconsin v. Mitchell*, ___ U.S. ___, 113 S. Ct. 2194, 2199 (1993), quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection"); *see also Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglas, J., concurring). RICO simply does not punish those who merely associate with RICO violators or who belong to organizations that systematically engage in unprotected, violent activity.[30] *Reves*

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[29] *See, e.g., United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.), *cert. denied sub nom. Rabito v. United States*, 469 U.S. 831 (1984) (dismissing RICO conspiracy count where government failed to show agreement to commit two predicate crimes); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990). Indeed, some courts have held that the agreed-to predicate acts must themselves form a "pattern." *See, e.g., Utz v. Correa*, 631 F. Supp. 592, 596 (S.D.N.Y. 1986) (RICO conspiracy claim against defendants dismissed because "[t]he only activities possibly chargeable to them fail to give rise to a pattern of racketeering activity").

[30] The lower courts have been vigilant in requiring that RICO allegations particularly describe the illegal conduct of *each* defendant. *See, e.g., Myers v. Finkle*, 758 F. Supp. 1102, 1111 (E.D. Va. 1990), *aff'd in pertinent part*, 950 F.2d 165 (1991) ("A RICO complaint must identify each 'person' who is alleged to be liable. Collectivizing 'defendants' in

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v. Ernst & Young, ___ U.S. ___, 113 S. Ct. 1163, 1170 (1993), offers further insulation from RICO liability for demonstrators who do not play "*some* part in directing the enterprise's affairs."

RICO's coverage so plainly excludes protected acts of protest that it would be unreasonable for a protester to eschew engaging in such conduct for fear of incurring RICO liability. RICO thus could very well have the effect of channeling toward lawful expressive activities those who might otherwise engage in both non-violent and violent protest tactics, thereby in fact augmenting the exercise of First Amendment rights.

B. RICO Also Poses No Threat To Non-Violent Civil Disobedience

A second important part of our tradition of protest consists of non-violent civil disobedience that cannot claim substantive constitutional protection, but that has served as an effective means of bearing moral witness against perceived injustice. *See generally* Martin Luther King, Jr., *Letter From the Birmingham City Jail* (1963). RICO poses no threat to such activity, since, properly construed, the "pattern of racketeering activity" required to trigger RICO does not include the acts of non-violent civil disobedience that

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[30](...continued)
the alleged pattern of racketeering activity will not suffice"); *Schick v. Ernst & Whinney*, [1990-1991 Transfer Binder] RICO Bus. Disputes Guide (CCH) ¶ 7685 at 11,324 (S.D.N.Y. January 18, 1991) (RICO allegations improperly failed to distinguish between the defendants); *Best Environmental Tech. v. Luff*, [1985-1987 Transfer Binder] RICO Bus. Disputes Guide (CCH) ¶ 6419 at 6,278 (E.D. Pa. July 24, 1986) ("In order to state a RICO claim against any individual defendant, the plaintiff must allege [each RICO element] *with regard to that defendant*") (emphasis added).

have characterized our tradition, such as criminal trespass and disorderly conduct.[31]

Examination of several important movements in this country's history, and of a highly effective, non-violent contemporary movement, demonstrates RICO's inapplicability to the kinds of expressive conduct and civil disobedience traditionally engaged in by social and political activists.

1. *The Abolitionist Movement*

In 1833, the American Anti-Slavery Society resolved that its members would not "vindicat[e slaves'] rights by resorting to physical force."[32] Accordingly, throughout the 1830s and '40s, the abolitionists kept their commitment to non-violence despite increasing violence directed at them by anti-abolitionists.[33] Abolitionists typically distributed newsletters advocating freedom for the slaves and organized campaigns to teach slaves how to read and write. These

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[31] The recent arrests of Patricia Ireland, President of NOW, and David Mixner, President Clinton's former senior campaign adviser, for acts of civil disobedience to protest the recently adopted policy relating to lesbians and gay men in military service (*see* Cindy Loose, *Former Clinton Adviser Arrested in Gay-Rights Protest at White House*, Wash. Post, July 31, 1993, at A5) make clear that even without an economic motive requirement RICO poses no danger of inhibiting traditional protest activity. RICO cannot reach Ireland's and Mixner's non-violent conduct because that conduct does not amount to predicate acts under 18 U.S.C. § 1961(1).

[32] Gerald Sorin, *Abolitionism* 89 (1972).

[33] Between 1830 and 1840, "there were three hundred cases of violent vigilante 'reprisal' against those who espoused anti-slavery opinions. The abolitionists did not generally retaliate." *Id.* at 90.

were crimes in the south but not acts that would have been subject to RICO as acts of racketeering, had RICO then been in effect.[34]

In their brief in opposition to plaintiffs' petition for writ of certiorari, at 7, respondents suggest that the abolitionists "extorted" the right to trade slaves. This argument is as inaccurate as it is offensive. The abolitionists operating the Underground Railroad cannot reasonably (and could not constitutionally) be construed as having taken "property" by extortion. Their purpose was to help slaves escape and start new lives, but their conduct involved no violence or threats of force to accomplish a deprivation of "property."[35] To the extent that violence did effect a transfer of property, of course, it was the violence of the Civil War, not that of the abolitionists.

2. *The Women's Suffrage Movement*

From its inception in the early 1870's, the women's suffrage movement was dedicated to obtaining voting rights for women in this country. Suffragists' activities for the most part were calculated to educate the public and included speeches, rallies, publishing a

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[34] John F. Hume, *The Abolitionists* 55-56; 76-77; 103-04; 116-17 (1905); *see also, Abolitionists in Northern Courts: The Pamphlet Literature* (Paul Finkelman, ed., 1988).

[35] The Model Penal Code defines theft by extortion to include "to bring about a transfer" of "property of another by threatening to: (1) inflict bodily injury on anyone; or ... (3) expose any secret tending to subject any person to hatred, contempt or ridicule; or ... inflict any other harm which would not benefit the actor." Model Penal Code §§ 223.0(5) and 223.4 (Official Draft and Revised Comments 1980). Extortion under the Hobbs Act, 18 U.S.C. § 1951(b)(2) (1984), is "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

newspaper (*The Revolution*), and distributing leaflets and circulars.[36] Some suffrage activists went further and engaged in acts of civil disobedience, but not the kind of felonious activity listed under RICO.

In 1917, some suffragists commenced an aggressive campaign of picketing the area around the White House to send a resistant President Wilson as well as the nation the message that women would not be denied the franchise. Their protests led to arrests on such charges as "blocking traffic and unlawful assemblage"[37] and "displaying propagandist banners without a police permit."[38] In addition, the suffragists ignited symbolic (but illegal) "watchfires for freedom" outside the White House,[39] and at least one activist actually set fire to the White House lawn.[40] Some suffragists, including Susan B. Anthony, were arrested and convicted of attempting to register to vote, in violation of the Act of May 31st, which criminalized knowingly voting without having the right to vote. *See United States v. Anthony*, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873).

None of these acts of civil disobedience, were they committed today, would constitute a predicate act under RICO.

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[36] *See* Eleanor Flexner, *Century of Struggle* 149, 153 (1975).

[37] *Woman Arrests Suffrage Pickets,* N.Y. Times, June 23, 1917, at 9.

[38] *Seize 12 Militants Near White House,* N.Y. Times, June 26, 1917, at 13.

[39] Linda G. Ford, *Iron-Jawed Angels* 236 (1991).

[40] *Id.* at 238. Setting such fires would not constitute arson. *See* Model Penal Code § 220.1 (1962): A person is guilty of arson ... if he starts a fire ... with the purpose of:

(a) destroying a building or occupied structure of another; or

(b) destroying or damaging any property, whether his own or another's, to collect insurance for such loss ....

3. *Sit-Ins And The Civil Rights Movement*

Defendants' attempt to analogize their activities to the civil rights movement is grossly inapt. The civil rights activists of the early 1960s did not aim to shut down targeted businesses. Rather, they wanted to open up such businesses, through non-violent action, to all customers who chose to patronize them. Those engaging in lunch counter sit-ins, for example, did not use violence or threats of force to compel restaurants to close; the Montgomery bus boycott was not an extortionate attempt to deprive bus owners of patronage. When owners lost business, it was not the result of threats or acts of violence by civil rights activists, but of the owners' voluntary refusal to serve blacks in common with whites.

The sit-ins were calculated to be non-violent, and the activist participants went to extraordinary lengths to accomplish that result. The sit-ins at all-white lunch counters in the south began in February 1960 in Greensboro, South Carolina, and participation in this highly visible and effective protest activity spread so rapidly that by October of that year there had been sit-ins in 112 southern cities.[41] At first unorganized, the sit-ins were soon being orchestrated by such organizations as the Congress of Racial Equality and the Southern Christian Leadership Conference (SCLC), the latter group led by Dr. Martin Luther King, Jr., organizations that consistently advocated non-violence.[42] The protestors themselves, despite intense provo-

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[41] Juan Williams, *Eyes on the Prize* 140 (1987).

[42] The mass meeting that organized the Nashville sit-in movement included a lecture on nonviolence. Taylor Branch, *Parting the Waters: America in the King Years 1954-63* 274 (1988). Similarly, at the April 1960 conference for sit-in organizers sponsored by the SCLC and attended by the Student Nonviolent Coordinating Committee, among others, the keynote speaker advocated non-violent protest. Branch, *supra*, at 291.

cation by white segregationists,[43] followed the credo of non-violence.[44]

Defendants' attempt to characterize sit-ins as extortionate reveals an extreme misreading of history. By far the majority of violence associated with the entire civil rights movement was directed at peaceful protestors, not committed by them.

4. The Gay Rights Movement

A measure of the frivolousness of respondents' contention that application of RICO to them would threaten the kinds of expressive conduct in which movements for social change engage, and on which the opportunities for orderly change in our society depend, is the fact that RICO has not been and could not be successfully applied to one of the principal civil rights movements today, the gay and lesbian rights movement.

Gay rights activists have achieved their successes in the last decade almost entirely through protected conduct — public education,

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[43] A student who participated in the Nashville sit-ins described an attack by white teenagers: "[They] stood in the aisles insulting us, blowing smoke in our faces, grinding out cigarette butts on our backs and finally pulling us off our stools and beating us. Those of us pulled off our seats tried to regain them as soon as possible, but none of us fought back in anger." Williams, *supra*, at 133 (citation omitted).

[44] Many of the decisions of this Court stressed the peacefulness — indeed the politeness — of the sit-in protestors. *See, e.g., Lombard v. Louisiana*, 373 U.S. 267, 268 (1963) (restaurant manager stated that protestors "did not cause any disturbance, ... were orderly ...."); *Peterson v. City of Greenville*, 373 U.S. 244, 247 (1963) ("[t]he manager and the police conceded that the petitioners were clean, well dressed, unoffensive in conduct, and that they sat quietly at the counter ...."); *Barr v. City of Columbia*, 378 U.S. 146, 150 (1964) (overturning a breach-of-peace conviction on the ground that "petitioners were polite, quiet, and peaceful from the time they entered the store to the time they left").

and grass-roots political organizing to support (or oppose) political candidates, legislation and referenda.[45] The principal national organizations embodying the movement over the years, including the Mattachine Society of the 1950s, the Gay Activist Alliance of the 1960s and '70s, the Campaign for Military Service, the National Gay and Lesbian Task Force, and Lambda Legal Defense and Education Fund, have advocated seeking change, and have sought change, without violence or the other illegal actions in which Operation Rescue and its co-conspirators have engaged.[46] Indeed, there are no noted prosecutions of gay rights activists for political protest; and, apart from the famous evening of resistance outside the Stonewall Bar in Greenwich Village, New York, where gay men resisted the efforts of police to arrest patrons for alleged violations of morals laws (a defensive engagement not subject to RICO that differed from Operation Rescue's repeated acts of violence and aggression as night from day), it is difficult if not impossible to list cases testing whether activity claimed to be political crossed the line into criminal activity.[47]

In sharp contrast to the activities of the Pro-Life Action Network, gay rights activists have attempted to bring about the changes they desire not through violence directed at those who disagree with them or who have discriminated against them, or by

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[45] *See generally* John D'Emilio, *Sexual Politics, Sexual Communities* (1983); Jonathan Katz, *Gay American History* (1976); Martin Duberman, *Stonewall* (1993); Adam, *The Rise of a Gay and Lesbian Movement* (1987); Licata, *The Homosexual Rights Movement in the United States*, in *6 J. of Homosexuality* at 170-84 (1981); Rubenstein, ed., *Lesbians, Gay Men, and the Law* (1993); *cf. Gay Students Serv. v. Texas A & M Univ.*, 737 F.2d 1317 (5th Cir. 1984), *cert. denied*, 471 U.S. 1001 (1985).

[46] *Id.*

[47] *Id.*

making others fear for their safety, but by bringing lawsuits, marching, and speaking out. Application of RICO as written to the type of conduct alleged in petitioners' complaint would have no chilling effect whatsoever on the gay rights movement.

C. RICO Does Pose A Threat To Political Terrorism, But Does Not Thereby Threaten Either Protected Expression Or Civil Disobedience

Unfortunately, illegal expressive acts have not always been confined to the arena of non-violent civil disobedience. Too often in our history, zealots, convinced of the absolute moral justice of their cause, have resorted to physical violence and intimidation in an effort to force others to relinquish important and valuable rights. Such political terrorism deserves no toleration, for whatever expressive content it may have is wholly overshadowed by the harm and destruction it causes.

Despite their alleged intention to bring about social change through First Amendment-protected activity, the defendants in this case have engaged in political terrorism.[48] Attempting to end abortion through forceful, coercive, and violent methods far removed from protected conduct or civil disobedience, defendants have, for example:

- threatened and used violence to force employees of clinics to abandon their jobs and to force those employees, as well as doctors, patients and prospective patients to relinquish important and valuable economic rights and property interests (JA 50-51, 55-57, 67);

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[48] Moreover, in contrast to some who commit symbolic acts to call attention to their cause and to gain influence, or who engage in activity to exert pressure directly on public officials, defendants use terrorism as a direct tool to impose their will on targeted groups.

- conspired to steal and stolen fetal remains and confidential patient and doctor information from laboratories to force clinic doctors, patients and prospective patients not to participate in abortions for fear of disclosure of private, sensitive information (JA 58-62, 69-70; and
- organized and implemented so-called "blitzes" or "rescues" in which scores of anti-abortion activists forcibly break into health clinics, violently disrupt clinic business, vandalize clinic property, and threaten the safety and well-being of all clinic affiliates (JA 55-57, 66-70). *See also* JA 95, 118-97.

These criminal acts have been devised and carefully orchestrated by an interstate network of lawbreaking anti-abortion groups associated in the Pro-Life Action Network, the goal of which is to shut down abortion-providing clinics by whatever means necessary.[49] Defendants have demonstrated their commitment to unlawful means by aiding and abetting others to shut down clinics by a combination of blockades, sieges, vandalism and the creation of a

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[49] Defendants, and others, have by no means limited their anti-abortion violence and intimidation to the specific acts at issue in this case. In addition to scores of lawsuits brought against Operation Rescue across the country over the past five years, current lawsuits include *New York State NOW v. Terry*, 1993 U.S. App. LEXIS 16355, (2d Cir. July 2, 1993) (per curium) (reinstating prior opinion, 961 F.2d 390 (2d Cir. 1991), in light of *Bray v. Alexandria Woman's Health Clinic*, ___ U.S. ___, 113 S. Ct. 753 (1993)); *Pro Choice Network v. Walker*, 994 F.2d 989 (2d Cir. 1993); *Town of West Hartford v. Operation Rescue*, 991 F.2d 1039 (2d Cir. 1993), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. July 19, 1993) (No. 93-____); *NOW v. Operation Rescue*, 816 F. Supp. 729 (D.D.C. 1993), *appeal pending*.

physically threatening and intimidating atmosphere, and by directly undertaking those activities themselves.[50]

RICO is an appropriate and constitutional response to such highly organized and widespread criminal activity. Far from threatening the First Amendment or our tradition of civil disobedience, its application to circumstances like those here promises to help put a stop to the intolerance of violent, self-righteous zealots bent on subverting the rule of law.

CONCLUSION

The statutory text does not include the economic motive element that the Seventh Circuit imposed to justify its dismissal of plaintiffs' RICO claim, and the wise policy of construing statutes in order to avoid constitutional doubt does not require implying any such element. If an economic motive were required, it is surely satisfied by defendants' intentional infliction of economic harm on petitioners. Concern for free speech and assembly rights, and even for the right to engage in traditional acts of civil disobedience, does not warrant immunizing defendants' widespread, organized criminal activity from

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[50] *See also Northeast Women's Center, Inc. v. McMonagle*, 670 F. Supp. 1300 (E.D. Pa. 1987), *aff'd in pertinent part*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), in which the plaintiff, a women's health center offering abortion services, proved at trial that, at various times over almost a two-year period, the defendants not only trespassed and blockaded the health center, they (1) knocked down and injured clinic employees, (2) surrounded and pounded on the windows of employees' cars, and (3) pushed, shoved, and tugged on patients who attempted to enter the health center.

RICO; those who do not commit or agree to commit serious crimes cannot be found liable under RICO. Accordingly, the judgment of the Court of Appeals should be vacated, and the case remanded for trial.

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Respectfully submitted,

DAVID I. GOLDBLATT,
Counsel of Record
CHARLES S. SIMS
HARRY W. LIPMAN
PROSKAUER ROSE GOETZ
& MENDELSOHN
1585 Broadway
New York, New York 10036
(212) 969-3000

DEBORAH A. ELLIS
BURT NEUBORNE
NOW LEGAL DEFENSE
AND EDUCATION FUND
99 Hudson Street
New York, New York 10013
(212) 925-6635

Attorneys for *Amici Curiae*

APPENDIX

APPENDIX

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The **NOW Legal Defense and Education Fund** (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and to secure equal rights. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF's work is to secure reproductive rights and specifically to ensure that women have access to clinics. To this end, NOW LDEF has litigated, both directly and as *amicus*, numerous cases against Operation Rescue, including *Bray v. Alexandria Women's Health Clinic*, ___ U.S. ___, 113 S.Ct. 753 (1993), which was argued by the legal director of NOW LDEF.

The **American Humanist Association** (AHA) is a national non-profit educational-lifestance organization founded in 1941. With more than 5,000 members across all 50 states, the AHA supports freedom of choice for all women with regard to reproductive matters and opposes all efforts to reduce accessibility to reproductive health services.

The **American Jewish Committee** (AJC) is a national membership organization, founded in 1906 to protect the civil and religious rights of Jews. AJC has always believed that the best way to accomplish this goal is to help preserve the constitutional rights of all Americans. AJC strongly supports a woman's constitutional right to reproductive freedom. AJC believes that access to abortion services is an integral component of this fundamental right and must be secured for all American women. While AJC supports the First Amendment rights of all Americans, it deplores the criminal interference with a woman's ability to exercise her constitutional right to choose.

American Medical Women's Association, Inc. (AMWA) is a non-profit organization of 13,000 women physicians and medical students. One of AMWA's primary missions is to promote quality health care for women. AMWA strongly supports laws which protect the right of the pregnant patient, in consultation with her physician, to make a personal, medically-informed decision whether or not to continue a pregnancy.

Americans for Religious Liberty (ARL), founded in 1981, is a nationwide non-profit public interest educational organization of over 9,000 members and supporters. ARL is dedicated to defending church-state separation and religious liberty, which includes the fundamental right of individual women to freedom of conscience in dealing with problem or unintended pregnancies, free of government or private interference. ARL has appeared before this Court in several religious liberty cases, most recently in *Lee v. Weisman*, ___ U.S. ___, 112 S. Ct. 2649 (1992).

Founded in 1974, the **Asian American Legal Defense and Education Fund** (AALDEF) is a civil rights organization that addresses critical problems in the Asian American community through litigation, advocacy, and community education. Its current program includes voting rights, immigrant rights, labor and employment rights. AALDEF represents victims of anti-Asian violence and seeks redress for Japanese Americans who were interned in U.S. camps during World War II. AALDEF supports the right of women to choose whether to have an abortion and opposes the violent acts of anti-abortion groups that prevent women from exercising that right.

B'nai B'rith Women is an organization of 100,000 Jewish women in the United States and Canada. It is strongly committed to helping women improve the quality of life for themselves, their families and society. In line with this goal, B'nai B'rith Women has worked for more than 20 years to assure a woman's right to choose in matters of reproductive rights. B'nai B'rith Women believes that anti-abortion violence is pointless, destructive behavior, and B'nai B'rith Women

has pressed for stiff penalties to be imposed on perpetrators of these crimes.

The **Chicago Abortion Fund** (CAF) is a non-profit agency founded in 1986 to lower the economic barriers to reproductive freedom. CAF's primary purpose is to make safe, legal abortions accessible to economically disadvantaged women by providing referrals and financial assistance to poor women in the Chicago area who seek abortion services; compiling statistics to document the extent of the need for financial assistant for abortion services; and engaging in activities to heighten public awareness of the problems faced by poor women who wish to terminate an unwanted pregnancy. CAF is acutely aware of the special problems low-income women face when they seek access to safe and affordable abortion services. Current and potential CAF clients suffer economic harm by the campaign of illegal anti-abortion violence carried out by the defendants in this case.

Founded in 1987, the **Feminist Majority Foundation** is a non-profit national organization with offices in Arlington, Virginia and Los Angeles, California. The Feminist Majority Foundation, which runs the largest clinic defense project in the nation, has witnessed first-hand the violence of anti-abortion extremists directed against clinics, health care workers, and women. Anti-abortion extremists are conspiring in an organized way to break the law nationwide and close established, legal businesses. RICO should provide a federal remedy for ending this reign of terror.

Lambda Legal Defense and Education Fund (Lambda) is a national public interest law organization that advocates for the rights of lesbians and gay men through impact litigation and education. The constitutional questions implicated in the struggle of women to control their bodies are similar to those faced by lesbians and gay men who seek to assure the right of individuals to engage in intimate associations without government interference. Lambda is specifically interested in the issues raised by this case because: (1) the application of RICO to a concerted pattern of violence directed at women who

use health clinics is of importance to lesbians and gay men, who have themselves been victims of campaigns of violence; and (2) at the same time, inasmuch as the full civil rights of lesbians and gay men have not yet been recog[illegible]ed, Lambda has a vital interest in assuring that the law protects legitimate protest while curbing violence.

The **Methodist Federation for Social Action** (MFSA) is a membership organization founded in 1907. MFSA's members are mostly United Methodist church members and leaders from across the entire United Methodist Church. In the course of a year, MFSA provides educational material and moral guidance and support to some 5,000 United Methodist activists and persons of conscience. Among MFSA's chief concerns is human rights, prominent among which are the reproductive rights of women. MFSA's interest in this case arises out of its belief that it is a human right of a woman to have available, and, if she so chooses, to use abortion facilities that are affordable, accessible and medically safe.

Founded in 1969, the **National Abortion Rights Action League** (NARAL) is the largest national organization working primarily to keep abortion safe, legal and accessible for all women. NARAL has 39 state affiliates and nearly 800,000 members nationwide. NARAL's mission is "[t]o develop and sustain a constituency that uses the political process to guarantee every woman the right to make personal decisions regarding the full range of reproductive choices, including preventing unintended pregnancy, bearing healthy children, and choosing legal abortion." NARAL works to elect pro-choice officials to all levels of government, and to protect the right to choose in the legislature, the courts, and at the clinics.

The **National Black Women's Health Project** (NBWHP) is a self-help, health education and advocacy organization which works to improve the health status and quality of life for African- American women and their families. It consists of 150 developing and established chapters in 25 states serving a broad constituency of approximately 2,000 members. The NBWHP is deeply concerned

about barriers that impede or prevent access to quality health services, including medically safe abortion services. The already poor health status of low-income African American women, due in part to lack of access to health care, is further exacerbated by the hostility, intimidation, and harm caused by clinic blockades. The NBWHP joins this brief to voice its opposition to the violent and harmful actions and tactics of Operation Rescue which prevent African American women from exercising their rights.

The **National Federation of Temple Sisterhoods**, (NFTS) including over 100,000 women of Reform Judaism in 600 local groups nationwide deeply committed to the social justice teachings of the prophets, serves Jewish and humanitarian causes. Since the 1960s the women of Reform Judaism have adopted resolutions in support of civil and social rights for all persons, anti-poverty programs and legislation, and the right to choose legal abortions. In 1987, the NFTS affirmed resolutions urging action to reduce teenage pregnancy and break the cycle of poverty. Moreover, the delegates at the recent 1991 Biennial Assembly called for support of legislation providing universal access to health care, including all aspects of reproductive health care, regardless of age, gender and economic status.

The **National Women's Law Center** (Center) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights. Since its inception in 1972, the Center has fought to develop and protect women's rights in a variety of areas, including reproductive freedom, health care, employment, education, family support and income security. Protecting women's access to reproductive rights and health care services is an important component of the Center's mission to advance the status of women through the law.

The **Northwest Women's Law Center** (Law Center) is a non-profit public interest legal organization in Seattle, Washington working to advance the legal rights of women through litigation, education and legislative advocacy. The Law Center has been serving women

throughout Washington since 1978, and has recently expanded its litigation program to serve women throughout the Northwest. The Law Center has done extensive work in the area of reproductive rights, particularly on the issue of clinic access. The Law Center was instrumental in the passage of a Washington state Clinic Access Bill and also litigated against Operation Rescue to enjoin their blockades against women's health clinics in Washington.

The **Union of American Hebrew Congregations** (UAHC) is the congregational arm of Reform Judaism representing over 850 Reform Jewish synagogues throughout the United States and Canada with a membership of one and one-half million Jews. The UAHC has long been committed to religious freedom, First Amendment rights, the right to privacy, and the expansion of women's rights, and has engaged in extensive educational work regarding those rights.

The **Unitarian Universalist Association** is a religious association of more than 1,000 congregations in the United States, Canada and elsewhere. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. In particular, the Association has adopted numerous resolutions affirming the principles of separation of church and state and of personal religious freedom. Most relevant to the case at bar are the Association's resolutions (a) affirming the right to choose abortion as a legitimate aspect of the right to privacy, and (b) promoting freedom of choice in reproductive matters including unrestricted access to counseling and abortion services, regardless of age, class, race or situation, without curtailing peaceful protest.

The **United Synagogue of Conservative Judaism**, founded in 1913, an association of Conservative congregations in North America, today consists of over 800 affiliated synagogues and over one and one-half million members. The objectives of the United Synagogue are the advancement of the cause of Judaism in America and the maintenance of Jewish tradition in its historic continuity.

Voters for Choice was founded by Gloria Steinem and Planned Parenthood Board Members in 1979, and is the only national organization devoted solely to electing pro-choice candidates to office. Voters for Choice has helped elect nearly 185 Members to Congress, and has also many governors and legislators. Voters for Choice provides technical assistance, strategic funding, and 13 years experience helping to elect those candidates who will be the pro-choice voices and votes in the halls of Congress and in the state legislatures. As the largest independent pro-choice political committee in the country, Voters for Choice is committed to electing leaders and to supporting efforts which will uphold reproductive rights for all women.

Women Employed is a national organization of working women, based in Chicago, with a membership of 2,000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination. Women Employed works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education. Women Employed strongly believes that any limitation on women's reproductive rights will have a profoundly negative impact on woman's opportunities to achieve economic equity.

The **Women's Equal Rights Legal Defense and Education Fund** (WERLDEF) is a nonprofit corporation organized to ensure that women are treated equally under the law. It achieves its goal by educating women about their legal rights and by assisting them to vindicate those rights by providing access to the courts.

The **Women's Law Center** is an advocacy organization whose membership consists of attorneys and judges in Maryland. In existence since 1971, the goal of the Women's Law Center is to promote the legal rights of women through litigation, legislation and education. The Women's Law Center has worked to protect reproductive rights for all women, including participation as *amicus curiae* in cases dealing with that issue. The Women's Law Center

believes the issues involved in *NOW v. Joseph Scheidler et al.* are critical to the legal rights of women.

The **Women's Law Project** (WLP) is a non-profit, feminist legal advocacy organization located in Philadelphia. Founded in 1974, WLP works to abolish discrimination and to advance the legal and economic status of women through litigation, public education and individual counseling. The Women's Law Project believes that the right to reproductive freedom is a fundamental component of women's ability to control their lives and live as free and equal citizens. The WLP has challenged a wide variety of state statutes designed to restrict abortion rights, including the Pennsylvania statutes in *Planned Parenthood v. Casey*, ___ U.S. ___, 112 S. Ct. 2791 (1992). The WLP has also worked vigorously to stop anti-choice harassment of women seeking abortions and of abortion providers in Pennsylvania, representing *amici curiae* in *Northeast Women's Center v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989), a case involving legal issues identical to those in this case. WLP believes RICO should be used to combat the ever-increasing levels of violence and harassment against women seeking abortions.

The **Women's Legal Defense Fund** (WLDF), a non-profit national advocacy organization, works at the federal and state levels to establish policies that offer equal opportunity to women, respond to women's basic economic and health needs, and enable women and men to participate fully in family and community life. Because WLDF believes that reproductive freedom for all women is fundamental to the achievement of these goals, it files *amicus curiae* briefs in major reproductive rights and health cases, advocates for reproductive rights and health care for women before Congress, and provides policy opinions about reproductive health policies to federal and state legislators.

The **YWCA of the U.S.A.** is a women's membership organization. Founded in 1858, it is committed to the empowerment of women and

to the elimination of racism. Currently, it serves over two million girls, women and their families through 400 YWCAs in 4,000 locations throughout the country. Because the YWCA has historically been concerned about women's health and the availability of care to women of all socio-economic backgrounds, it advocates that no woman should be deprived of reproductive choice if she needs it and it is not contrary to her personal beliefs. As we believe that legal restrictions and the prohibition of abortions affect primarily poor women, the YWCA of the U.S.A. supports the position taken in this *amicus curiae* brief.

No. 92-780

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BRIEF OF THE STATES OF NEW YORK, CONNECTICUT, ILLINOIS, MINNESOTA, NORTH CAROLINA, OHIO AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ROBERT ABRAMS
Attorney General of the State of New York
120 Broadway
New York, New York 10271
(212) 416-8240

JERRY BOONE
Solicitor General

SANFORD M. COHEN
Assistant Attorney General
Counsel of Record

(Additional Counsel on Inside Cover)

RICHARD BLUMENTHAL
Attorney General of the
State of Connecticut
55 Elm Street
Hartford, Connecticut 06106
(203) 566-2026

ROLAND W. BURRIS
Attorney General of the
State of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3000

MICHAEL F. EASLEY
Attorney General of the
State of North Carolina
P.O. Box 629
2 East Morgan Street
Raleigh, North Carolina 27602-0629
(919) 733-3377

STEPHEN D. ROSENTHAL
Attorney General of the
Commonwealth of Virginia
101 North 8th Street
Fifth Floor
Richmond, Virginia 23219
(804) 786-2071

HUBERT H. HUMPHREY III
Attorney General of the
State of Minnesota
102 State Capitol
St. Paul, Minnesota 55155
(612) 296-6196

LEE FISHER
Attorney General of the
State of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-3376

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INTEREST OF THE *AMICI CURIAE*

Amici are states where health care facilities have been targets of blockades and other conspiratorial activity by Operation Rescue, its local affiliates and other antiabortion extremists. *Amici* respectfully submit this brief in support of petitioner National Organization for Women and other petitioners.

The activities of Operation Rescue, similar organizations and persons who share their methods are intended to interfere and have interfered with the ability of state and local law enforcement authorities to maintain law and order. Those activities have

also interfered with women and men seeking reproductive health care. Operation Rescue's activities have severely strained the law enforcement and judicial resources of the affected states.

As states, *amici* have a strong interest in ensuring that civil peace is maintained and in protecting the right of citizens to engage in lawful protest activities. Because of the unlawful activities like those respondents are alleged to have engaged in, other citizens have been deprived of lawful reproductive health care, including abortion services. *Amici* have an interest in securing and maintaining the confidence of their citizens that once abortion services have been made available, those who limit access to such services by unlawful activity will be subject to the full force of all available legal remedies, state and federal.

Amici have, as well, a strong interest in ensuring that their citizens are empowered by federal law to combat the unlawful and injurious activities of which respondents are accused. Operation Rescue is engaged in a conspiracy that is national in scope; its *modus operandi* is to overwhelm state and local law enforcement resources. Civil actions and criminal prosecutions brought under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, address the national scope of violence against abortion providers and support the efforts of state and local governments to maintain peace and order. *Amici* submit that compelling reasons exist for securing this meaningful federal remedy in the arsenal of remedies available to curtail and redress the extortionate activities at issue in this case.

SUMMARY OF ARGUMENT

Violence against providers of abortion services is widespread and beyond any single state's or locality's law enforcement capabilities to redress. Opposition to abortion by Operation Rescue and those who share its methods has taken a violent direction and is intended to overrun local police forces and reproductive health providers. Remedies available in the district courts can address the nationwide scope of antiabortion violence.

The plain text of RICO prohibits the pattern of racketeering activity alleged in the complaint in this case. Nowhere in that text is there any positive sign that Congress intended RICO to reach only enterprises or their criminal predicate acts that have a financial purpose or an economic motivation. Rather, section 1962(c) makes it unlawful to conduct or participate in the conduct of an enterprise's affairs through a pattern of racketeering activity, a prohibition which surely addresses the lawless acts defendants are alleged to have carried out. Moreover, the legislative history is not in conflict with the plain text of the statute; indeed, that history demonstrates that Congress did not intend to restrict the reach of RICO to enterprises or crimes with an economic motivation. The economic purpose requirement engrafted onto RICO by the lower court produces confusing and unpredictable results.

RICO can be invoked against violent antiabortion protesters without trammelling precious First Amendment rights. The threat of such prosecutions does not impermissibly chill lawful expression or association.

ARGUMENT

I. VIOLENCE AGAINST PROVIDERS OF ABORTION SERVICES PRESENTS A PROBLEM OF NATIONAL SCOPE REQUIRING A FEDERAL REMEDY

Blockades of health care clinics and other disruptive, health-threatening activities by Operation Rescue and similar organizations and individuals, such as bombings, arson and vandalism of clinics, and assaults, threats of violence, and harassment and intimidation of patients and staff, present a problem of national dimension. The magnitude of these activities is beyond the capability of any one state's laws or law enforcement authorities effectively to redress.

The geographical range of the numerous cases brought against Operation Rescue, local affiliates and other extremeists illustrates

the high and sustained level of nationwide activity.[1] While many of the cases have sought civil remedies against the antiabortion extremists, orders or judgments entered in them have frequently been disobeyed, leading to contempt proceedings both civil[2] and criminal[3] in nature.

The coordinated nature of the conduct is evident in the similarity with which harassment and violence, including arson, bombing, assaults and batteries, and clinic invasions, occur

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[1] *E. g., Bray v. Alexandria Women's Health Clinic*, U.S. , 113 S. Ct. 753 (1993)(Virginia); *Pro-Choice Network of Western New York v. Walker*, 994 F.2d 989 (2d Cir. 1993)(Buffalo, N.Y.); *Town of West Hartford v. Operation Rescue*, 991 F.2d 1039 (2d Cir. 1993)(Connecticut); *New York State N.O.W. v. Terry*, 886 F. 2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 948 (1990)(New York City); *Lucero v. Operation Rescue of Birmingham*, 954 F.2d 624 (11th Cir. 1992)(Alabama); *Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530 (9th Cir. 1991)(Washington State); *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991)(Ohio); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 110 S.Ct. 261(1989)(Pennsylvania); *Portland Feminist Women's Medical Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988)(Oregon); *Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417 (W.D.N.Y. 1992)(Buffalo, N.Y.); *Women's Health Care Services v. Operation Rescue*, 773 F. Supp. 258 (D. Kan. 1991), *app. pending*, No. 91-3250 (10th Cir.)(Kansas); *Planned Parenthood Association of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617 (N.D. Cal. 1991)(California); *Town of Brookline v. Operation Rescue*, 762 F. Supp. 1521 (D. Mass. 1991)(Massachusetts); *Southwestern Medical Clinics of Nevada v. Operation Rescue*, 744 F. Supp. 230 (D. Nev. 1989)(Nevada); *NOW v. Operation Rescue*, 726 F. Supp. 300 (D.D.C. 1989)(District of Columbia); *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Cal. 1989)(California); *Bering v. Share*, 721 P.2d 918 (Wash. 1986)(Washington State); *People of the State of New York v. Operation Rescue National, et al.*, No. 92 Civ. 4884 (S.D.N.Y.)(New York City); *State of Wisconsin and City of Milwaukee v. Missionaries to the Preborn et al.*, No. 92 CV 008-195 (Wisc. Cir. Ct)(Wisconsin).

[2] *Pro-Choice Network of Western New York v. Walker*, 994 F. 2d at 989; *Aradia Women's Health Center v. Operation Rescue*, 929 F. 2d at 534; *Women's Health Care Services v. Operation Rescue National*, 1991 WL 228341 (D. Kan., Oct. 9, 1991); *People of the State of New York v. Operation Rescue National*, No. 92 Civ. 4884(RJW)(S.D.N.Y., Aug. 5, 1992).

[3] *United States v. Terry*, 815 F. Supp. 728 (S.D.N.Y. 1993); *In re Slovenec*, 799 F. Supp. 1441 (W.D.N.Y. 1992).

throughout the nation.[4] Those tactics have been documented to include:

> [I]nvading clinics, blocking entrances and parking lots, making phone calls to clinics and to employees' homes which threaten death to employees and threaten bombing of the clinics; photographing and filming patients and employees; copying down and tracing license plates of patients and making harassing phone calls to them at home; banging on doors and windows while surgery is in progress; flinging fetuses in the faces of patients trying to enter; and setting up gauntlets through which patients must pass.[5]

It is not merely the similarity of the conduct, however, that illustrates the coordination of the nationwide activities. In fact, antiabortion leaders have met to discuss the lawless tactics for their opposition and have issued guidebooks and plans for carrying them out.[6] For example, in April 1984, eighty or more antiabortion leaders from thirty states gathered in Appleton, Wisconsin and announced, under the organizational banner of the "Pro-Life Action Network," a " 'Year of Pain and Fear' for

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[4] The National Abortion Federation has tabulated incidents of violence against abortion providers between 1977 and April 1993. *See Testimony of Willa Craig Before the Committee on Labor and Human Resources*, United States Senate (May 12, 1993), Table. It reports that there have been 1,295 incidents of violence (including murder, bombing, arson, attempted bombing, attempted arson, invasion, vandalism, assault and battery, death threats, kidnaping, burglary and stalking); 5563 incidents of disruption (hate mail and harassing calls, bomb threats, picketing); and 563 clinic blockades resulting in 32,953 arrests.

[5] Oversight Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 99th Cong., 1st & 2d Sess. [hereinafter "*Abortion Clinic Violence*"], at 174(Testimony of Prof. Rhonda Copelon); *see also* Note, *Using Civil RICO to Battle Anti-Abortion Violence: Is the Last Weapon in the Arsenal a Sword of Damocles?* [hereinafter "*Using Civil Rico*"], 25 New Eng. L. Rev. 1363, 1388-89 (1991).

[6] *E.g.* Scheidler, *Closed: 99 Ways to Close Abortion Clinics* (1985); Terry, *Operation Rescue* (1988).

anyone receiving or performing an abortion."[7] Following that call to action, in 1985, 88% of nonhospital facilities performing three-fourths of abortions in the United States reported "some type of harassment," including 48% reporting bomb threats and 47% reporting that patients had been physically blocked from entering the clinics.[8]

In the summer of 1991, Operation Rescue issued a national call targeting two clinics in Wichita, Kansas for blockades. Large numbers of extremists converged on Wichita, closing the clinics for a week until federal marshals, enforcing an injunction entered by the district court, restored order. The district court observed that "[b]y targeting Wichita as the focus of its national efforts, Operation Rescue has virtually overwhelmed the resources of the city's relatively small police forces to respond with dispatch and effectiveness." *Women's Health Care Services v. Operation Rescue*, 773 F. Supp. at 265. The events in Wichita resulted in more than 2700 arrests.[9]

In 1992, the pace of these lawless activities accelerated. In April, antiabortion leaders organized mass blockades of clinics in Buffalo, New York, which resulted in 605 arrests.[10] In June, blockades comprised largely of the children of antiabortion protesters began in Milwaukee, lasting more than ten months and resulting in more than 2,000 arrests, over four hundred of which involved juveniles.[11] Anti-abortion leaders made a national call

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[7] *Abortion Clinic Violence*, *supra* n. 5 at 617 (Letter of Faye Wattleton, President Planned Parenthood Federation of America, to Atty. Gen. Edwin Meese, III, May 16, 1985).

[8] Note, *The Use of Civil RICO Against Antiabortion Protestors and the Economic Motive Requirement*, 90 Colum. L. Rev. 1341, 1342 (1990).

[9] Testimony of Willa Craig, *supra* n.4, Table.

[10] *Id.* The State of New York brought suit against Operation Rescue and its leaders, including Randall Terry, a respondent in this matter, joining private litigants in the effort to preserve access to clinics in Buffalo and surrounding municipalities. *People of the State of New York v. Operation Rescue National, et al.*, 92-CV-0147A (W.D.N.Y.).

[11] *Testimony of Willa Craig*, *supra* n.4, Table.

for blockades in New York City during July to coincide with the Democratic National Convention scheduled to occur there.[12] Similar calls for blockades in Baton Rouge, Louisiana during July and Houston, Texas during the Republican National Convention in August led to further mass arrests.[13]

Similarly, in July 1993, Operation Rescue and other antiabortion extremists targeted clinics and providers in seven cities across the United States – Minneapolis, Philadelphia, Melbourne (Florida), Jackson (Mississippi), Cleveland, San Jose and Dallas/Ft. Worth – for "direct action." Coined the "Cities of Refuge," the plan called for blockades of clinics and harassment

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[12] Again, the State of New York sued Operation Rescue National and its leaders. *People of the State of New York v. Operation Rescue National, et al.*, 92 Civ. 4884 (RJW)(S.D.N.Y.). On July 13, 1992, the district court issued a preliminary injunction enjoining blockades and other activities. On July 14, under the guidance of Bi-State Operation Rescue Network (B.O.R.N.), a local affiliate, four antiabortion protesters made phony appointments for medical services at a clinic, and, upon entering the office, locked themselves into an examining room and destroyed an aspirator, causing hundreds of dollars in damages. B.O.R.N. and the vandals were held in civil contempt and fined a total of $100,000. *Id.* (Judgment, dated August 5, 1992). A violation of the preliminary injunction by Randall Terry resulted in his conviction under 18 U.S.C. § 401(3), *see United States v. Terry*, 815 F. Supp. at 737, and sentencing to five months imprisonment.

[13] The litigation experience of the State of New York demonstrates the nationwide scope of respondents' activities. The suits brought in Buffalo and New York City named as defendants antiabortion leaders from Georgia, Virginia, New York, South Carolina and elsewhere. One of the defendants, Joseph Foreman, had been leading children *en masse* to blockade clinics in Milwaukee when he arrived in New York. Another, a South Carolina resident, was organizing blockades in Baton Rouge while calling for blockades in New York City. Several weeks after the district court directed the arrest of five contemnors in the New York City litigation, two of them, Randall Terry, a New Yorker, and Patrick Mahoney, a Virginia resident, were held on contempt charges in Houston. When the criminal contempt trial of Randall Terry was about to begin in New York City, one of his witnesses, Jeff White, a leader of Operation Rescue-California, had to be transported by federal marshals to Manhattan from jail in Western New York, where he was incarcerated for criminal contempt of an injunction of the District Court for the Western District of New York. *See United States v. Terry*, 806 F. Supp. 490 (S.D.N.Y. 1992); *In re Slovenec*, 799 F. Supp. 1441 (W.D.N.Y. 1992).

of physicians and other health personnel at their homes and in their communities.[14]

The cost of that lawlessness is daunting, and serves the perpetrators' extortionate objectives. For example, the National Abortion Federation has reported that the cost of police and other municipal responses in Wichita was $1,000,000, more than $1.5 million in Milwaukee and almost $400,000 in Buffalo.[15] Those costs do not include the expenses of clinics or organizations responding to the blockades. The Federation reports the damage caused by arson and bombing incidents at clinics during 1992 at nearly $2.4 million.[16] Seventy-one known incidents of noxious chemical vandalism during 1992, such as the spreading of butyric acid in clinics' ventilation systems, resulted in at least $545,050 in damage.[17] The Federation does not include in those estimates the expenses of increased insurance premiums or security systems and personnel that providers have incurred.

There is no tally of the cost in human suffering to the patients who are harassed at clinics or to the health care professionals who are subjected to threats of violence and intimidation at their homes and in their communities. It is apparent, however, that the antiabortion leaders do not respect the safety of patients. As one provider testified before Congress:

> Anti-abortion protestors have shown little or no regard for the physical and emotional well-being of people entering and leaving reproductive health care facilities. . . Studies

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[14] In connection with the "Cities of Refuge" plan, Operation Rescue leaders issued letters describing the activities. Those letters explained that the project had been in preparation for more than a year, and included the convening of two "Impact Team" training sites, one in Melbourne, Florida, and the other near Minneapolis, which served as "boot camps" for those who would engage in clinic takeovers and other lawless action. *See* Letter of Keith Tucci, Executive Director, Operation Rescue-National, dated April 4, 1993, and Letter of Randall Terry, Founder, Operation Rescue, dated April 4, 1993. Those letters, as is typical, also solicited monetary contributions to support both the Impact Team training and "direct action" against clinics during the Cities of Refuge.

[15] *Testimony of Willa Craig, supra* n. 4, Table.

[16] *Id.*

[17] *Id.*

have shown an increased rate of complications at abortion facilities where demonstrations take place.

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While I respect the right to peacefully demonstrate, I cannot tolerate the constant abuse and harassment patients are subjected to, often including physical as well as emotional assault, screaming, name-calling and threats to their well-being. Patients have reported that their license plates have been traced and they have been harassed. They have received phone calls in the middle of the night . . .

[At "right to life" seminars] it has been recommended that anti-abortion people dress up as medical staff and stand outside the abortion facility, stop patients on their way in, offer them coffee or soda and donuts. . . [O]nce they have had something to eat, the abortion cannot be safely performed because of the risk of vomiting inherent in the administration of anesthesia to someone who has eaten. If the patient realizes that she has been tricked by the anti-abortion zealots, she may, without realizing the risk to her own health, lie to the medical staff and not tell them she has eaten anything. She may endanger her well-being because she wants the abortion to be performed that day . . . .[18]

Intimidation of abortion providers has resulted in a national decline in the number of physicians willing and able to provide service.[19] According to one respected source, the number of

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[18] *Abortion Clinic Violence*, *supra* n. 5, at 573-75 (Testimony of Bill Baird); *see also id.* at 5-7 (Testimony of Mary Bannecker, Administrator, Northeast Women's Center, Philadelphia, PA); *id.* at 11-12 (Testimony of Heather C. Green, Director of Community Education, Hillcrest Clinic, Norfolk, VA); *id.* at 20-22 (Testimony of Katherine Taylor, Portland, OR); *id.* at 26-33 (Testimony of Beverly Whipple, Executive Director, Feminist Women's Health Center, Yakima, WA); *id.* at 36-37 (Testimony of Joan Babbott, M.D., Executive Director, Planned Parenthood of Connecticut).

[19] Antiabortion leaders have expressed little concern, much less remorse, for the slaying of Dr. David Gunn, an abortion provider in Pensacola, Florida, whose facility was targeted by Operation Rescue. Following the murder, respondent

(Footnote continued)

physician providers declined in thirty-four states between 1985 and 1988.[20]

Operation Rescue and other antiabortion leaders are committed to breaking the law, and have elevated lawlessness to a

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Scheidler stated: "I have to admit that some good came out of it; Doctors are going to be more difficult to get." *Chicago Tribune*, March 12, 1993, p. 1. At about the time of the slaying, Randall Terry stated: "We've found the weak link is the doctor. We're going to expose them. We're going to humiliate them." English, "Anti-Abortion Extremists Taking Civil Disobedience Down Uncivilized Road," *Sun Sentinel* (Fort Lauderdale, FL) March 19, 1993, p. 15A. Several weeks later, in the April 4, 1993 mass mailing he sent soliciting participation in the so-called "Cities of Refuge" scheme, Terry promised Operation Rescue adherents that "more abortionists will be exposed and confronted."

[20] Testimony of Pablo Rodriguez, M.D., Medical Director, Planned Parenthood of Rhode Island before the Committee on Labor and Human Resources, United States Senate (May 12, 1993) at 6, citing Alan Guttmacher Institute, *Abortion Fact Book* (1992). Dr. Rodriguez testified graphically to the harassment he has experienced during a recently launched campaign against providers called "No Place to Hide":

> In the beginning, the harassment was the usual nasty letter and graphic pictures of dismembered fetuses; but slowly it became more aggressive. I began receiving strange packages with dolls inside, as well as subscriptions to gun magazines and hunting lodges, showing pictures of dead animals hanging by their extremities. The "Wanted Posters" began to appear; the first one taped to the front door of the clinic for patients to see. Copies of this hideous poster were also sent to my wife at home and to my office. Then the doors and locks to our clinic were glued on multiple occasions culminating with three episodes of forceful blockading of our clinic. During one of the invasions, the police failed to arrest anyone and when arrests were finally made, the fines were minimal and there were no jail sentences given. The day Dr. Gunn was shot, I knew that my life would irrevocably change.
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> One week after his death, as I was driving my mother to the bus station, I realized that my car was steering poorly. . . I examined my tires and found that there were 45 nails deeply embedded in them . . . . The following week I received a bill for an insurance policy on my wife's life. I contacted the insurance company who merely stated that somebody filled a fraudulent application . . . . Most recently, I received an I.D. card for a catastrophic health and dismemberment policy . . . . All of this courtesy of those who call themselves "pro-life."

Id. at 3-4.

political, indeed, religious principle. Randall Terry has written that when the law conflicts with *his values*, "the law must give way." Terry, *Operation Rescue* at 124-25. He exhorts his followers to engage in mass disregard of the law so that law enforcement and judicial resources will be overtaxed and fail.[21] And he urges disrespect for and disobedience to judicial orders and officers.[22] Respondent Scheidler has written that his cause "cannot wait for the legislative and judicial process that will make abortion illegal. The activist has to save lives now." Scheidler, *Closed: 99 Ways to Stop Abortion* at 17. Similarly, he testified before Congress that blockades and vandalism are justified by a "higher law" and refused to condemn arson, bombings and other acts of violence.[23]

In view of the nationwide scope of antiabortion lawlessness, and the tactic of overwhelming local law enforcement, the Attorney General of the United States has concluded that the problem caused by Operation Rescue and like groups "transcends the ability of any single local jurisdiction to address it."[24]

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[21] *See* Terry, *To Rescue the Children* 49 (1986)("You should check how overloaded the city's jails and court systems are. In many, many cities, the courts and jails are too overloaded to deal with rescue missions.")

[22] *See* Terry, Letter in Operation Rescue Pamphlet quoted in Note, *Judicial Ineffectiveness: The Inability to Curtail Unlawful Right to Life Protest Activity*, 35 N.Y.L.S. L. Rev. 447, 450 n.55 (1990)("If a judge bows to the pressure of pro-abortion forces, he must know [that] . . . [t]hese cases will take up precious time on an already overcrowded docket . . . . He will look foolish to the public for issuing an order because rescuers won't obey."); Terry, Letter of April 2, 1990("If a judge sentences rescuers to . . . jail, and catches flak from the community, it will cause him to think twice about his injustice and he will probably back off . . . If he doesn't respond, then work to get him recused from cases, or removed from office. Give him no rest.")

[23] *Abortion Clinic Violence*, *supra* n. 5, at 60-76.

[24] Testimony of Janet Reno, Attorney General, Before the Committee on Labor and Human Resources, United States Senate (May 12, 1993) at 4. *See also* Remarks of David R. Lasso, City Manager and Former City Attorney, Falls Church, Virginia, Before the Committee on Labor and Human Resources, United States Senate (May 12, 1993) at 5("It was not until the federal district court in the *Bray* litigation issued an injunction against Operation Rescue that the blockades of the clinics in Falls Church stopped. Federal intervention made all the difference in ending the massive blockades.").

Actions under RICO brought by persons or entities injured by antiabortion lawlessness amounting to extortion are one proper weapon in the arsenal to ensure that political opinion is lawfully expressed. As the statute plainly addresses such lawlessness by enterprises, whether or not they are motivated by economics, this Court should reverse the judgment of the Court of Appeals holding that the allegations of respondents' lawlessness do not state a claim for relief.

II. RICO PROVIDES A REMEDY FOR THE EXTORTIONATE ACTS OF ANTIABORTION PROTESTORS

Petitioners brought this action pursuant to 18 U.S.C. § 1964(c)[25], which provides a civil remedy to any person injured by reason of a pattern of racketeering activities prohibited by section 1962. The complaint, which detailed the extensive criminal activities of defendants' enterprise, alleged, *inter alia*, violations of 18 U.S.C. § 1962(c). While expressing no doubt that the complaint adequately alleged that defendants had committed predicate acts which constitute racketeering activity under RICO, the Court of Appeals, following Second Circuit doctrine[26], affirmed the district court's dismissal of the complaint on the ground that plaintiffs did not allege that defendants' enterprise or the crimes it committed had an economic motivation. *National Organization for Women v. Scheidler*, 968 F.2d 612, 625-30 (7th Cir. 1992).

In requiring that an enterprise or its criminal activities that are otherwise prohibited by section 1962(c) must be shown to have had an "economic motivation," the Court of Appeals for

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[25] Section 1964(c) provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c).

[26] *See United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985); *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983); *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983).

the Seventh Circuit engrafted onto the statute an element that appears nowhere in its words or history. As this Court observed in an analogous context, "If Congress had intended the . . . circumscribed approach espoused by the Court of Appeals, there would have been some positive sign that the law was not to reach" criminal activities that fall within the language of the statute. *United States v. Turkette*, 452 U.S. 574, 593 (1981)(rejecting contention that RICO does not reach illegitimate businesses). Scrutiny of the language and structure of RICO and a review of the legislative history reveals that Congress did not intend to require that that an enterprise or its predicate criminal acts have an economic motivation.

A. The Plain Text of the Statute Does Not Contain an Economic Motivation Requirement

This Court has repeatedly observed that "[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " *United States v. Turkette*, 452 U.S. at 580 quoting *Consumer Product Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980). *See also Reves v. Ernst & Young*, __ U.S. __, __, 113 S.Ct. 1163, 1169 (1993); *Russello v. United States*, 464 U.S. 16, 20 (1983). Moreover, when this Court is called upon to discern Congress's intent in enacting the RICO statute, it is faced with a "text, in which Congress followed a 'pattern [of] utilizing terms and concepts of breadth.' " *H.J. Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 229, 237 (1989) quoting *Russello v. United States*, 464 U.S. at 21. Indeed, Congress has directed that RICO "be liberally construed to effectuate its remedial purposes." Publ. L. 91-452, § 904(a), 84 Stat. 947, note following 18 U.S.C. § 1961. *See H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. at 249 (emphasizing that RICO is not to have a "pinched construction"); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985)("*Sedima*")(noting RICO's "self-consciously expansive language and overall approach"). "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime. . . . [I]t is in this spirit that all of the Act's provisions should be read." *Id.*, 473 U.S. at 498.

Since its passage, this Court has applied these principles in rejecting efforts by parties to engraft limitations on RICO not apparent in its text. *United States v. Turkette*, 452 U.S. at 580, rejected the argument that "RICO does not make criminal the participation in an association which performs only illegal acts and which has not infiltrated a legitimate enterprise." *Russello v. United States*, 464 U.S. at 20, rejected the contention that the forfeiture provision of section 1963(a)(1) reaches only "interests in an enterprise," not all proceeds acquired or maintained in violation of section 1962, as the statute states. And in *Sedima*, this Court rejected the limitations imposed by the Court of Appeals that a RICO "civil action can proceed only after a criminal conviction," 473 U.S. at 488, and that the statute redresses only a "racketeering injury." *Id.* at 493-500. This Court should reject the "economic motivation" limitation imposed by the Seventh Circuit, as well.

The language of RICO "gives no obvious indication," *id.*, 473 U.S. at 488, that a civil action can proceed only against an economically motivated enterprise. Section 1962(c), under which this action was brought, states:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). That section does not mention "economic motive."

Similarly, section 1961(4), which describes the term "enterprise," contains no indication that an enterprise covered by the act must have an economic motivation. It states that:

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

18 U.S.C. § 1961(4). As this Court observed in *United States v. Turkette*, 452 U.S. at 580, "[t]here is no restriction embraced by the definition: an enterprise includes any union or group of individuals associated in fact." In the absence of any express indication in the language of the statute that "enterprise" is limited to entities with a financial purpose, one must assume that "the legislative purpose is expressed by the ordinary meaning of the words used." *Russello v. United States*, 464 U.S. at 21. It is apparent that the ordinary meaning of "enterprise" includes associations that have no economic motivation as well as those that do.[27] Just as the definition "no more excludes criminal enterprises than it does legitimate ones," *id.* at 580-81, it no more excludes enterprises motivated by non-monetary objectives than it does those with economic motivations. Had Congress intended to reach only criminal associations motivated by economics, "it could easily have narrowed the sweep of the definition by inserting a single word . . . ," business, before "enterprise." *See United States v. Turkette*, 452 U.S. at 581.

Nor can any hint that Congress required an enterprise or its criminal conduct to be motivated by economics be found in the statute's list of predicate offenses which define "racketeering activity." *See* 18 U.S.C. § 1961(1) (defining "racketeering activity" to mean certain felonies, including potentially non-economically motivated crimes such as murder, arson, obstruction of justice and witness tampering). The only concern about economic activity expressed by Congress in the language of the statute is in the limitation that an enterprise subject to its terms be "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a)-(c). There is no dispute that the activities of the enterprise sued here affect interstate commerce.

Nothing in the structure of section 1962 demands the economic motivation requirement. Both the Seventh Circuit and the Second Circuit have deduced that the use of the term "enterprise"

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[27] The dictionary definition of "enterprise" includes "a project or undertaking that is esp. difficult, complicated or risky" and "a systematic purposeful activity." *Webster's New Collegiate Dictionary* 377 (1980).

in subdivisions (a)[28] and (b)[29] of section 1962 requires that the use of that term in subdivision (c) "refer[] to 'an organized profit-seeking venture.' " *National Organization for Women v. Scheidler*, 968 F.2d at 627 quoting *United States v. Ivic*, 700 F.2d at 60. That conclusion is erroneous.

In *Ivic*, the Second Circuit noted that subdivision (a) makes it unlawful to use funds derived from a pattern of racketeering to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce and that subdivision (b) makes it unlawful to acquire or maintain an interest in or control an enterprise through a pattern of racketeering activity. It concluded that the evil Congress sought to address in those provisions was the investment of funds acquired through racketeering in an enterprise, or the acquisition through racketeering of an interest in an enterprise. It therefore concluded that both provisions contemplate "the sort of entity in which funds can be invested and a property interest of some sort acquired. . . ." *Id.* From those conclusions, the *Ivic* court was led to two further conclusions: first, that an enterprise is "the sort of entity which one joins to make money . . . an organized profit-seeking venture," and, second, that "enterprise" means the same in subdivision (c) as in the other sections and, therefore, subdivision (c) prohibits only those activities leading to investment in or an acquisition of an

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[28] Section 1962(a) provides, in pertinent part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(a).

[29] Section 1962(b) provides:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(b).

interest in an enterprise. *Id.* There are several flaws in the *Ivic* court's analysis.

First, it overlooks the language of section 1962(a) and (b). Section 1962(a) not only makes it unlawful to use the proceeds of racketeering to acquire an interest in an enterprise, but also to use those proceeds for the "establishment or operation of" an enterprise. Section 1962(b) not only makes it unlawful to acquire through racketeering activity an interest in an enterprise, but also to "acquire or maintain . . . control" of an enterprise through racketeering activity. An enterprise can be "operated" or "controlled" within the meaning of section 1962(a) and (b) even if funds cannot be invested in it or a property interest acquired from it. In fact, this Court has recognized that the term "enterprise" includes "illegitimate" associations in fact, *United States v. Turkette*, 452 U.S. at 580, in which formal investments cannot be made.

Second, even if it were true that sections 1962(a) and (b) contemplate only enterprises in which investments can be made or from which property can be acquired, neither section suggests that the enterprise must be "profit-seeking." Section 1962(a) prohibits the investment of racketeering-generated income to establish or operate an enterprise. It is plain that not-for-profit organizations, like for-profit entities, require funds for start-up and operation and that income produced through racketeering can meet those needs. Similarly, section 1962(b) prohibits the acquisition of an interest in an entity through racketeering activities; nothing in the statute limits "interest" to a property interest, much less to one in a profit-seeking venture. Courts regularly apply RICO to enterprises that are not profit-seeking.[30]

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[30] *United States v. Hocking*, 860 F.2d 769, 778 (7th Cir. 1988)(state Department of Transportation); *United States v. De Peri*, 778 F.2d 963, 974 (3d Cir. 1985)(police department), *cert. denied*, 475 U.S. 1110 (1986); *United States v. Qaoud*, 777 F.2d 1105, 1116 (6th Cir. 1985)(court), *cert. denied*, 475 U.S. 1098 (1986). *See also United States v. Webster*, 669 F.2d 185, 186 (4th Cir.)("[T]he proper question should have been whether the affairs of the enterprise were conducted through a pattern of racketeering activity, not whether they were benefitted or advanced or whether profit to the [enterprise] resulted."), *cert. denied*, 456 U.S. 935 (1982); *United States v. Altomare*, 625 F.2d 5, 7 n.7 (4th Cir. 1980)("[C]ourts have almost uniformly refused to adopt the narrow reading of 'enterprise' that would have that word connoting legitimate, private, commercial entities.").

Third, section 1962(c) says nothing about investing or acquiring an interest in an enterprise. Rather, it makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . . " 18 U.S.C. § 1962(c). To the extent that section 1962(a) contemplates enterprises in which investments can be made, it is because section 1962(a) prohibits the investment of racketeering-generated funds in an enterprise, not because of the statutory definition of enterprise. Similarly, if section 1962(b) contemplates enterprises from which an interest can be acquired, it is because that section prohibits the acquisition through racketeering of an interest in an enterprise. Any limitation on the type of enterprises that are covered by those sections derives not from the meaning of the term "enterprise," but from the elements of the crimes specific to those sections, i.e., investing racketeer money in, or acquiring through racketeering an interest in, an enterprise. That section 1962(c) has no such limitation demonstrates that the enterprise covered there need not be one that can absorb an investment or yield an interest. Rather, a section 1962(c) enterprise need only be one whose affairs can be conducted through racketeering activity.[31]

B. The Legislative History of RICO Reveals that Congress Did Not Intend an Economic Motivation Requirement

Nothing in the language or structure of RICO discloses an intention by Congress to limit the act's reach to enterprises or

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[31] Several months after its decision in *Ivic*, another Second Circuit panel, implicitly recognizing the weakness of the *Ivic* court's "structural analysis," eschewed the conclusion that the enterprise must be one with an economic motivation, referring to the discussion in *Ivic* as *dictum*. *United States v. Bagaric*, 706 F.2d at 56-57 (affirming RICO conviction of Croation terrorists). It held that § 1962(c) applies to enterprises that are not economically motivated, so long as the predicate acts have a "financial purpose," but cited no language in the statute that embraces that limitation. *Id.* Separated from any moorings in the language of the statute, the doctrine was eroded even further when the Court of Appeals held that the financial purpose of the enterprise or predicate acts need not even be "significant." *United States v. Ferguson*, 758 F.2d at 853 (affirming RICO conviction of members of Black Liberation Army).

predicate acts with a financial purpose. This Court's inquiry should begin and end there: RICO requires no economic motive. Moreover, in the absence of a " 'clearly expressed legislative intent to the contrary', " *United States v. Turkette*, 452 U.S. at 580 (citation omitted), the language of the statute is conclusive. In fact, the presumption that the plain meaning of a statute expresses legislative intent will be rebutted only in "rare and exceptional circumstances." *Ardestani v. INS*, ____ U.S. ____, ____, 112 S.Ct. 515, 520 (1991). The legislative history of RICO, far from evincing a legislative intent contrary to the plain reading of the statute, is consistent with the conclusion that no economic motivation requirement was intended.

First, no basis for the "economic motivation" requirement can be found in the statute's purposes set forth in the statement of findings that prefaces the Organized Crime Control Act of 1970 (OCCA), 84 Stat. 922-23, of which RICO was one of twelve titles.[32] That preface illuminates Congress's concern when it enacted OCCA that organized crime and the money and power it acquired drained the country's economy and increasingly were used to corrupt the democratic process. To be sure, "[t]he occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. at 248. Thus, if it were true that Congress did not expressly contemplate that the statute would be invoked against enterprises such as defendants', that would not mean that the statute were being misconstrued or is ambiguous. " '[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.' " *Sedima*, 473 U.S. at 499 quoting *Haroco Inc. v. American*

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[32] Both the *Ivic* court and the court below stated that they discerned the economic motivation limitation in the purposes Congress sought to advance. *See National Organization for Women v. Scheidler*, 968 F.2d at 628 ("[W]e believe congressional concerns may not have extended so far as the activities of political terrorists which involve neither economic crimes nor economic motivations."); *United States v. Ivic*, 700 F.2d at 61 ("Further light upon the meaning of § 1962(c) is cast by the statement of findings that prefaces the Organized Crime Control Act of 1970").

National Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

Just as the use of RICO "against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is [not] a sufficient reason for assuming that the provision is being misconstrued," *id.*, the use of section 1964(c) against defendants' enterprise is no occasion to impose an amorphous "economic motivation" requirement on the statute. If plaintiffs' ability to use RICO to seek civil redress for defendants' politically motivated criminal acts is a defect, "it is one 'inherent in the statute as written' ", *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. at 249 quoting *Sedima*, 473 U.S. at 499, and is for Congress to correct should it see fit.

Second, on two occasions, Congress considered and rejected versions of bills leading to RICO that would have limited the act's reach to economically motivated enterprises. "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. at 23-24. One predecessor bill would have made a it a felony to acquire with income derived from criminal activity "any beneficial interest in any of the assets, liabilities or capital of any business enterprise" engaged in interstate commerce. S. 1623, 91st Cong., 1st Sess., § 2 (1969). In enacting RICO, and in particular, section 1962(c), Congress determined to use the broad term "enterprise" rather than "business enterprise." *See also* 18 U.S.C. § 1961(4)(defining "enterprise").

After hearings on a number of predecessor bills, the Senate Judiciary Committee added a subsection (e) to section 1962,[33] which stated: "A violation of this section [1962] shall be deemed to continue so long as the person who committed the violation continues to receive any benefit from the violation." The bill that ultimately passed both houses did not include that language, demonstrating Congress's intent not to include an economic

[33] *See* S.30, 91st Cong., 1st Sess., § 1962(e)(1969), reprinted in S. Rep. No. 617, 91st Cong., 1st Sess. 1-2 at 23.

motivation requirement in the statute. *See* Note, *supra* at n. 8, at 1359-60.[34]

The debates surrounding the passage of OCCA reveal Congress's intent to enact a statute of broad reach. For example, as this Court recounted in *H.J. Inc. v. Northwestern Bell Telephone Co.*, when opponents criticized OCCA because it failed to limit the statute's reach to organized crime, "the sponsors made evident that the omission of this limit was not an accident but a reflection of OCCA's intended breadth." *Id.* 492 U.S. at 246. Senator McClellan, a leading proponent of OCCA, rejected the argument that, because it was the danger posed by organized crime which moved Congress to examine the criminal justice system, it should "follow . . . that any proposals for action from that examination be limited to organized crime[.]" 116 Cong. Rec. 18913 (1970).

Senator McClellan expressly rejected criticism of the statute's intended reach beyond organized crime:

> S. 30 is objectionable on civil liberties grounds, the [Civil Liberties Union] and city bar committee suggest, because its provisions have an incidental reach beyond organized crime. Coming from the Civil Liberties Union in particular, this objection is indeed strange. Has the union forgotten that the Constitution applies to those engaged in organized crime just as it applies to those engaged in white collar or street crime? S. 30 must, I suggest, stand or fall on the constitutional questions without regard to the degree to which it is limited to organized crime cases. If the bill violates the civil liberties of those who are engaged in organized crime, it is objectionable as such. But if it does not violate the civil liberties of those who are engaged in organized crime, it

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[34] Congress further evinced its intent not to make economic motivation an element of a RICO claim in providing coverage over all entities where a pattern of racketeering activity might be found. *See* 116 Cong. Rec. 592 (List of Entities in Which Organized Crime Has Been Active, including charities, foundations, governmental agencies and other non-profit entities); *id.* at 601, 606 (comments of sponsors on corruption of public officials). That intent is evident in RICO's definition of "enterprise," which includes "any . . . group of individuals associated in fact." 18 U.S.C. § 1961(4).

> does not violate the civil liberties of those who are not engaged in organized crime, but who nonetheless are within the incidental reach of provisions primarily intended to affect organized crime.

Id. at 18914. *See also id.* at 18491 ("It is self-defeating to attempt to exclude from any list of offenses such as that found in Title IX all offenses which commonly are committed by persons not involved in organized crime.") In fact, when Senator Kennedy observed that OCCA could apply to noneconomically motivated actors, such as Dr. Benjamin Spock, who was convicted of conspiring to violate the Selective Service Act, Senator McClellan agreed, and did not object: "I do not know why anyone should not count violations of the Civil Rights Act, the draft laws, or anything else that is a felony."[38]

Representative Poff, a principal House sponsor, echoed Senator McClellan's understanding, stating:

> It is true that there is no organized crime definition in many parts of the bill. This is, in part, because it is probably impossible precisely and definitively to define organized crime. But if it were possible, I ask my friend, would he not be the first to object that in criminal law we establish procedures which would be applicable only to a certain type of defendant?

Id. at 35204.

The legislative history does not demonstrate a congressional intent to impose an economic motivation requirement in conflict with the plain text. "[I]ndeed, the legislative history shows that Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. at 246. Congress enacted RICO in the face of criticism — and with the intent — that it would apply beyond organized crime to politically motivated extremists.

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[38] 116 Cong. Rec. 845-46. *See also* Note, *supra* n. 8, at 1360-64 (recounting sponsors' responses to criticism that RICO reaches noneconomically motivated actors).

C. The Economic Motivation Requirement Will Embroil Courts and Juries in Controversy Irrelevant to RICO's Purposes

In rejecting the argument that a private civil RICO action can be brought only to redress a distinct "racketeering injury," this Court expressed its discomfort with the "vagueness of that concept." *Sedima*, 473 U.S. at 494. Pointing out that the opinion of the *Sedima* Court of Appeals "gave scant indication of what racketeering injury means" and that the difficulty of defining that term "itself cautions against imposing such a requirement," this Court concluded that "[t]here is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement." *Id.*

Economic "purpose" or "motivation" are similarly amorphous requirements. Untethered to any textual definition, and unencumbered by any explanation of its possible meaning in the legislative history of RICO, the "economic motivation" requirement can only sow confusion in the courts rather than promote clarity and predictable applications of the statute. That confusion is already evident in the development of the doctrine in the Second and Eighth Circuits.

As we discussed above, the Second Circuit first identified the economic purpose requirement in *United States v. Ivic*. That case involved the conviction of Croation partisans of independence who used "terror, assassination, bombings, and violence in order to foster and promote their beliefs and in order to eradicate and injure persons whom they perceived as in opposition to their beliefs." 700 F.2d at 58. The Court of Appeals reversed the conviction because the indictment did not charge that the enterprise or predicate acts had any "financial purpose." The court located the financial purpose requirement in, among other places, the structure of section 1962 and in the congressional concern that organized crime was infiltrating legitimate businesses which animated the enactment of RICO. *Id.* at 60-63. The Court of Appeals explained that for a civil RICO action to lie the individual defendants must be seeking "personal gain," *id.* at 61; their conduct must have a "mercenary motive," *id.* at 59; the predicate acts must have a "financial purpose," *id.*; and the enterprise must be "the sort of entity one joins to make money." *Id.* at 60.

The Second Circuit quickly discarded those requirements in *United States v. Bagaric*, however. That case, like *Ivic*, involved the conviction under RICO of Croation independence partisans. The evidence at trial in *Bagaric* included proof that the defendants had used murder and threats of violence to extort money from other Croations and used that money to fund the enterprise's political activities. The *Bagaric* court characterized as *dictum* the *Ivic* court's argument that the structure of section 1962 indicates a congressional intent that the enterprise be profit-seeking, *id.* 706 F.2d at 56-57, recognizing that the "situation reached by § 1962 may . . . not always be one in which the enterprise 'makes money' for its members" and that Congress intended to cover non-profit entities "invested in, acquired or maintained through a pattern of racketeering." *Id.* Nevertheless, the court affirmed the RICO convictions, although there was no proof that the enterprise threatened to infiltrate legitimate business, while adhering to the requirement that at least the predicate acts must have a "financial purpose." It did not explain why the defendants in *Bagaric*, any more than those in *Ivic*, represented a threat of organized crime infiltration into legitimate businesses.

The Second Circuit continued to erode the *Ivic* standard in *United States v. Ferguson*, in which members of the Black Liberation Army were convicted under RICO for bank robberies and murders through which they acquired funds for their revolutionary activities. The Court of Appeals rejected the argument that its cases required "that there must be a *significant* economic purpose for RICO to apply." *Id.*, 758 F.2d at 853(emphasis in original). Rather, following the post-*Ivic* decision in *Bagaric*, the *Ferguson* court held that some economic dimension to the enterprise or predicate acts is sufficient for RICO liability. *Id.*

In short, from *Ivic*, where the Second Circuit required that the enterprise or its acts be profit-seeking, it has retreated to the *Bagaric/Ferguson* requirement that the enterprise or predicate acts merely involve an economic aspect. That requirement finds no textual or historical support.

In the Eighth Circuit, the economic motive doctrine is equally confused. With no explanation, that court has most recently stated that "[f]or purposes of RICO, an enterprise must be

directed toward an economic goal." *United States v. Flynn*, 852 F.2d 1045, 1053 (8th Cir. 1988) (citing *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980)[36], *cert. denied*, 450 U.S. 912 (1980) and *United States v. Ivic*, 700 F.2d at 59-65). However, that court has also expressly held that a RICO enterprise is not limited to "units of *economic* organization, whether public or private." *United States v. Clark*, 646 F.2d 1259, 1265 n.11 (8th Cir. 1981)(emphasis in original).

Moreover, in *United States v. Ellison*, 793 F.2d 942 (8th Cir. 1986), the court appeared to eschew an economic motive requirement altogether. That case involved "the founder and leader of a group dedicated to securing the supremacy of white Christians by promoting and engaging in defensive activities such as survivalism and paramilitary training, and in offensive activities intended to cause the downfall of the United States government." *Id.* at 945. The government proved that Ellison's enterprise, the "Covenant, the Sword and the Arm of the Lord," ("CSA"), committed two arsons, including the burning of a church "the congregation of which allegedly consisted of homosexuals." *Id.* The court of appeals, in affirming Ellison's conviction, stated:

> Although the two arsons that the government relied on to establish a pattern of racketeering activity had no direct financial benefit to CSA or Ellison, the evidence showed that these predicate acts did bolster CSA members' morale and commitment to CSA, and in the instance of the burning of the church . . ., furthered CSA's intentions to punish nonconforming groups.

Id. at 950. The court found that the "two arsons constituted a 'pattern' because they stemmed from the same or similar purposes, involved the same group of participants, and had similar methods of commission," *id.*, and held that Ellison had conducted CSA's affairs through a pattern of racketeering activities. Thus, notwithstanding its most recent statement in *Flynn*, it is not at

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[36] The *Scheidler* court recognized that the "economic goal" discussion in *Anderson* was *dictum*. 968 F.2d at 627 ("[E]conomic motive was not an issue in . . . *Anderson*. . . . The lack of significant focus on motive weakens the authority of [*Anderson*] somewhat on this particular issue . . . .")

all apparent that the Eighth Circuit has in the past imposed an "economic motivation" requirement.

In addition to leading to confusing and unpredictable results in the application of RICO, the "economic motivation" requirement invites courts and juries to consider irrelevant matters in determining whether an enterprise has engaged in unlawful racketeering activity. The *Bagaric* court itself noted that it was "troubled by the notion . . . that the Government will be required to prove the animating or long-run objective of a RICO enterprise was economic, apparently to the exclusion of other, collateral 'motives.' " 706 F.2d at 53 n.11. It noted that defense counsel had "sought to inject peripheral political and religious considerations into the trial of this case, implying that appellants' anti-Communism or Catholicism, or their persecution by American and Yugoslavian officials acting in concert, justifiably drove them to commit the acts of extortion and violence charged in the indictment." *Id.* at 54. It feared that the requirement of determining whether non-economic purposes predominate "would authorize the admission of political beliefs, racial animosity, and family and blood feuds as justification for criminal acts" in contradiction with "the traditions of our criminal law [which] contemplate trials free of consideration of such issues. . . ." *Id.* at 55.

Those fears are well-founded. Although the *Bagaric* court expressed its intention that such considerations not enter into RICO prosecutions, courts and juries faced with an obligation to assess whether an enterprise or its racketeering acts have a "financial purpose" surely will inquire about the significance of competing motives, such as religious, political or psychological objectives, and seek to weigh whether financial or other concerns predominated in the commission of crimes. Those inquiries are by and large foreign to criminal prosecutions and civil actions, for they inflame passions and defeat the fair administration of justice. Indeed, motive, while sometimes relevant evidence, is not generally an element of a crime. *United States v. Pomponio*, 429 U.S. 10, 12-13 (1976); *United States v. Washington*, 705 F.2d 489, 493 (D.C.Cir. 1983); *United States v. Howard*, 504 F.2d 1281, 1284 (8th Cir. 1974).

This Court has previously stated that "[a] violation of § 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a

pattern (4) of racketeering activity. The plaintiff must, of course, allege each of these elements to state a claim. . . . But the statute requires no more than this." *Sedima*, 473 U.S. at 496-97. There can be no dispute that petitioners alleged each element of a § 1962(c) claim set forth by the *Sedima* Court. The requirement of economic motivation or purpose which the court below read into RICO invites consideration of questions irrelevant to the traditional concerns of the law. Because it is not plainly required by the text or history of the statute and serves no policy relevant to RICO, economic motivation should not be required in a civil or criminal RICO prosecution.

III. RICO CAN BE APPLIED TO POLITICALLY MOTIVATED RACKETEERING ENTERPRISES CONSISTENTLY WITH THE PRINCIPLES OF THE FIRST AMENDMENT

Although it is not a question that the Court has certified for review, *amici* anticipate that respondents will argue that a civil suit alleging a violation of section 1962(c) cannot proceed without trammelling precious First Amendment rights.[37] *Amici* are steadfast in their view that the rights of speech and association, which are so fundamental to our constitutional democracy, must not be infringed. We are confident, however, that an action under RICO against those who advocate violence to obtain governmental restrictions on the right to privacy can proceed consistently with the important values enshrined in the First Amendment.

There can be no question that meetings, speeches, petitions, nonviolent picketing and boycotts are forms of speech and conduct that are entitled to protection under the First Amendment. "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process" and citizens must be able to make their views known by collective effort, lest their voices "be faint or lost." *Citizens Against Rent Control Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981). Such speech may cajole others to boycott businesses without losing its protected

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[37] *See, e.g.*, Brief of Respondents Joseph M. Scheidler, et al. In Opposition to the Petition for Certiorari, at 23-28. *See also* Califa, *RICO Threatens Civil Liberties*, 43 Vand. L. Rev. 805 (1990).

character. *Thornhill v. Alabama*, 310 U.S. 88 (1940). Indeed, "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *National Association For the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982)("*Claiborne*"); *see also Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). Moreover, the right to associate does not lose constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected. *Claiborne*, 458 U.S. at 908.

But while the use of speech, marches and threats of social ostracism cannot provide the basis of a damages award or judgment in equity, "violent conduct is beyond the pale of constitutional protection." *Id.* at 933. "[V]iolence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of advocacy." *Samuels v. Mackell*, 401 U.S. 66, 71 (1971)(Douglas, J., concurring). No federal rule of law prevents a court from imposing liability for losses that are caused by violence and threats of violence. *Claiborne*, 458 U.S. at 916.

So, too, are there limitations on speech when it impermissibly crosses a line encroaching on important realms of privacy. Of course, even speech that is intended to be "offensive" is entitled to the protection of the First Amendment. *Texas v. Johnson*, 491 U.S. 397, 407-10 (1989). Generally, the burden for avoiding unwelcome speech in a public forum is on the listener, not the speaker. *E.g. Cohen v. California*, 403 U.S. 15, 21 (1971). But, the First Amendment accords no right to trespass on private property. *Hudgens v. NLRB*, 424 U.S. 507 (1976). Similarly, restrictions on speech that causes emotional turmoil to medical patients, jeopardizing their safety and impairing their recovery, are also permitted by the First Amendment. *NLRB v. Baptist Hospital*, 442 U.S. 773, 784-86 (1979).

The possibility that damages may be assessed or injunctions entered against antiabortion protesters who have engaged in a pattern of racketeering activity does not threaten their protected rights of speech or association even though they may also advocate lawful means of protest. *Amici* recognize that when unlawful

conduct occurs in the context of constitutionally protected activity, " 'precision of regulation' is demanded." *Claiborne*, 458 U.S. at 916 quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963). *But see Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941)(Pervasive violence may justify injunction against violent and nonviolent protest activity as an "utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force."). Nothing in this action or in the nature of civil or criminal RICO runs athwart the principle that restrictions aimed at unprotected conduct should not unduly infringe protected speech.

This Court's First Amendment jurisprudence provides sufficient guidance so that fundamental associational and speech rights need not be infringed by civil RICO litigation. First, a civil action cannot, and need not, impose sanctions for the consequences of nonviolent, protected activity. Any judgment entered should ensure that "[o]nly those losses proximately caused by unlawful conduct . . . be recovered." *Claiborne*, 458 U.S. at 918. *See also United Mine Workers v. Gibbs*, 383 U.S. 715, 729-30 (1966).

Second, a RICO prosecution will not punish individuals for mere association with those who advocate lawless action. "For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *Claiborne*, 458 U.S. at 920. The First Amendment imposes a barrier against too broad an application of a conspiracy claim, as well.[38] Only antiabortion protest organizers who have a specific intent that others engage in illegal activity and who counsel others to engage in such activity can be held liable for a RICO conspiracy. Even those who advocate lawless action cannot be held liable unless there is evidence that they authorize, direct or ratify specific lawless activity, or that they have made

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[38] Section 1962(d) of RICO provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962(d).

speeches likely to incite lawless activity which were followed within a reasonable period by such activity. *Id.* at 928; *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).[39] Nothing in plaintiffs' allegations in this case threatens to overstep those limits.

Finally, there is no reason to fear that application of RICO to antiabortion racketeering will chill protected activity. Because a RICO civil action requires allegations that each defendant has engaged in specifically delineated criminal conduct, the possibility that the application of RICO will have a chilling effect is minimal as each defendant will realize before hand that he is violating the law. *See*, Note, *supra* at n. 8, at 1372. Moreover, as respondents themselves recognize, other laws, such as those against harassment, nuisance and tortious interference can provide redress from the type of lawless conduct they are alleged to have undertaken. RICO should chill lawful expressive activity no more than any other legal remedy.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the action should be remanded for trial.

Dated: August 13, 1993

ROBERT ABRAMS
Attorney General of the State of New York
120 Broadway
New York, New York 10271
(212) 416-8240

JERRY BOONE
Solicitor General

SANFORD M. COHEN
Assistant Attorney General
Counsel of Record

[39] Such advocacy, however, could be used as evidence that a defendant "gave other specific instructions to carry out violent acts or threats." *Claiborne*, 458 U.S. at 927.

No. 92-780

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IN THE
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OCTOBER TERM, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Petitioners,
v.
JOSEPH SCHEIDLER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*

Of Counsel:
KIRK B. JOHNSON
EDWARD B. HIRSHFELD
MICHAEL L. ILE
AMERICAN MEDICAL ASSOCIATION
515 North State Street
Chicago, Illinois 60610
(312) 464-5000

ANN E. ALLEN
AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS
409 12th Street, S.W.
Washington, D.C. 20024
(202) 638-5577

JACK R. BIERIG *
DAVID F. GRAHAM
RICHARD D. RASKIN
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Attorneys for Amici Curiae American Medical Association and American College of Obstetricians and Gynecologists

* Counsel of Record

August 13, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a violation of 18 U.S.C. § 1962(c) requires proof that either the enterprise or the predicate acts of racketeering activity are economically motivated.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*

The American Medical Association and the American College of Obstetricians and Gynecologists respectfully submit this brief as *amici curiae* in support of petitioners. The written consent of all parties has been obtained and filed with the Clerk in accordance with Supreme Court Rule 37.3.

INTEREST OF AMICI CURIAE

Amicus American Medical Association ("AMA") is a private, voluntary, non-profit organization of physicians. Founded in 1846, its purpose is to promote the science and art of medicine and to improve the public health. The

AMA's 280,000 members include practitioners in all areas of medicine, medical research, and medical education.

Amicus American College of Obstetricians and Gynecologists ("ACOG") is a private, voluntary, non-profit organization of physicians who specialize in obstetric and gynecologic care. ACOG is the leading group of professionals providing health care to women. Its over 33,000 members represent approximately 90 percent of all obstetricians and gynecologists practicing in the United States.

This case involves alleged systematic attempts to use criminal activity as a means of preventing medical practitioners from carrying on their professional work. *Amici* and their members have a vital interest in ensuring that physicians and the facilities in which they practice are adequately protected from the disruptions caused by concerted criminal activities. Such protection is necessary not only to guard the lives and livelihoods of physicians themselves but, most importantly, to ensure the health and safety of patients, to preserve their unimpeded access to lawful and proper medical care, and to advance the public interest in medical research.

Increasingly, medical practitioners, medical researchers and medical facilities across the nation have become targets of criminal attacks by individuals and organizations who wish to halt or impede their work. The instant case involves one frequent target of such illegal acts—clinics that perform abortions or provide reproductive counseling. Although abortion is clearly a subject of intense societal debate, these clinics and the physicians associated with them have too often been the subject of lawless conduct that goes far beyond mere speech. Such conduct has included actual and attempted murders, kidnappings, bombings, arsons and extortion.[1] Earlier this

[1] *See, e.g., United States* v. *Anderson*, 716 F.2d 446 (7th Cir. 1983) (clinic physician and his wife kidnapped from home at gun-

year, for example, physician David Gunn was murdered outside a Pensacola, Florida abortion clinic after protesters distributed "wanted" posters with his name and picture on them.[2]

But the problem is by no means limited to the abortion context. Organized illegal attacks on medical practice and especially on medical research arise from an expanding list of sources. In recent years, vigilantes have firebombed medical laboratories and set fire to medical research facilities as well as women's health clinics. Physicians, nurses and other health practitioners have received death threats and been the subject of direct attacks.

These activities have been carried out by extremist groups acting under the banners of such causes as animal rights, environmentalism, antibiotechnology and antimilitarism.[3] The tragic costs of this criminal conduct include, of course, the pecuniary and personal losses suffered by the immediate victims. In addition, however, these acts take a serious toll on the progress of medicine in this country and the consequent wellbeing of our citizens.

Organized illegal conduct of this sort poses distinct law enforcement problems and requires distinctive remedies. It is not enough to pursue each individual wrongdoer. Rather, it is essential to have a remedy against any organization through which these types of activities are

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point, held captive for eight days, and threatened with execution unless he ceased performing abortions).

[2] S. Stein, "Abortion Doctors Under Siege; Protestors Decry Killing; Defend Focus on Physicians," *Chicago Tribune* (March 12, 1993), at 1.

[3] *See, e.g.*, A. Trafford, "The Rise of Medical Vigilantes," *Washington Post* (Sept. 8, 1987), at Z15; M. Specter, "Animal Research Labs Increasingly Besieged; Violence, Threats From Activists Force Institutions to Tighten Security," *Washington Post* (May 30, 1989), at A1; J. Adams, "After Second Bombing, FBI Warns Academics," *Chicago Tribune* (June 25, 1993), at 2.

conducted. The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), provides such a remedy.

Amici fully support the right of individuals and organizations to make known their views on matters of public importance. *Amici* submit, however, that criminal attacks against health practitioners and researchers—even when motivated by an ideological commitment—are readily distinguishable from legitimate forms of political expression. Such criminal actions should be subject to the full panoply of legal remedies. To support the availability of RICO remedies against those who engage in such actions, *amici* submit this brief in support of petitioners.

STATEMENT OF THE CASE

Petitioners are two health clinics that provide abortion services and a national non-profit organization aimed at advancing and protecting women's rights. The relevant respondents (the "PLAN defendants") are several individuals and organizations who are active in an anti-abortion coalition named Pro-Life Action Network ("PLAN"). J.A. 48-55.[4]

1. Petitioners filed this action in the United States District Court for the Northern District of Illinois, alleging violations of several sections of RICO—specifically Sections 1962(a), (c) and (d)—and of the Sherman Act, 15 U.S.C. § 1 *et seq.* 968 F.2d at 614. Petitioners also pleaded pendent state law claims. During the course of proceedings in the district court, petitioners' initial complaint was amended twice and was supplemented by a "RICO Case Statement" which further detailed their RICO allegations. J.A. 39-80, 87-117.

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[4] The following citation forms are used in this brief: "J.A." refers to the Joint Appendix filed with the Court; "968 F.2d" refers to the opinion of the court of appeals; and "765 F. Supp." refers to the opinion of the district court.

As amended and supplemented, the complaint alleged that respondents had engaged and were engaging in a conspiracy to close health clinics providing abortions through a pattern of illegal activity, including the extortionate use of force and threatened force against physicians, other health care personnel, and patients. J.A. 65-74. In particular, petitioners alleged that between 1980 and 1990 the PLAN defendants and their co-conspirators had engaged in a wave of criminal activity directed against such clinics. This activity included, *inter alia*, firebombings; numerous other acts of arson and attempted arson; direct threats of personal harm to clinic personnel and patients, as well as threats against the clinics' landlords, laboratories and suppliers; assaults and batteries upon clinic staff and personnel; ransacking of clinics with accompanying criminal destruction of property; and home and business invasions (including in one case, the invasion of a judge's home). J.A. 91, 118-97. These activities and others were alleged to be for the purpose of driving clinics performing abortions out of business. J.A. 39.

Count three of petitioners' complaint is the only count currently at issue before this Court. Count three characterizes these alleged illegal activities as violations of 18 U.S.C. § 1962(c) and, because this violation was alleged to be the result of a conspiracy, also of Section 1962(d). Specifically, petitioners alleged that PLAN is an associational "enterprise" under RICO. Petitioners further alleged that PLAN's affairs had been conducted by the PLAN defendants through a pattern of unlawful predicate illegal acts that caused substantial injury to petitioners' business and property. J.A. 72-73.

2. The district court granted respondents' motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. With respect to count three, the court relied on a line of cases following the Second Circuit's opinion in *United States* v. *Ivic*, 700

F.2d 51 (2d Cir. 1983). It held "that an economic motive requirement exists to the extent that some profit-generating purpose must be alleged in order to state a RICO claim" under Section 1962(c). 765 F. Supp. at 943. The district court found that the allegations of count three failed to satisfy this "economic motive requirement" because "the primary objective of the alleged enterprise and its pattern of predicate acts was to drive clinics that perform abortions out of business"—"not to obtain money." [5] *Id.* at 944.

3. The court of appeals affirmed. Like the district court, the court of appeals relied upon *United States* v. *Ivic*, 700 F.2d 51 (2d Cir. 1983). It held that a RICO violation requires "that either the predicate acts or the enterprise be geared toward economic gain." 968 F.2d at 628. Although the court of appeals did not "contest that the defendants' activities had an economic effect on the plaintiffs," or that their "reprehensible criminal" conduct was designed to raise the clinics' costs and drive them out of business, the court refused "to equate that effect with the economic motive required by *Ivic* and its progeny." *Id.* at 630. The court accordingly found that petitioners had not "satisfied the economic motive requirement of § 1962(c)," because "the aim of the extortion is to close women's health centers," and held that count three had appropriately been dismissed. *Id.* at 630.

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[5] The district court also rejected petitioners' argument that even if some "economic motive" were required, it was present because the PLAN defendants' unlawful activities were in part designed to elicit increased donations and financial support. "If this were the case, a plaintiff in a RICO action could meet the economic motive requirement simply by alleging . . . that the defendant was motivated by the possibility of gaining financially from the voluntary contributions of those sympathizers during the course of the activities. This result is nonsensical, and the court refuses to adopt it." 765 F. Supp. at 944.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that Section 1962(c) of RICO requires proof of "economic motivation" in order to establish a violation. Section 1962(c) contains four specific elements. *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496-97 (1985). None of these elements, explicitly or implicitly, requires proof of economic motivation. Accordingly, an organization that systematically engages in illegal acts of vigilantism designed to interfere with the provision of medical care or the advancement of medical science is subject to liability under Section 1962(c)—regardless of whether the organization has a profit-seeking purpose.

First, a RICO "enterprise" need not be motivated by a desire for economic gain. Quite to the contrary, the statutory definition of a RICO enterprise encompasses "any" organization, individual, or group of individuals associated in fact. 18 U.S.C. § 1961(4). This definition manifests a clear intent to reach broadly and does not support any implicit limitations. *Russello* v. *United States,* 464 U.S. 16, 21 (1983). Certainly, there is no warrant in the language of the statute for engrafting an economic motivation requirement onto the carefully crafted, expansive definition of a RICO enterprise.

Second, RICO does not require that a defendant's "racketering activity" be economically motivated. RICO defines racketerring as any act or threat that is unlawful under certain state or federal criminal laws. 18 U.S.C. § 1961(1). There is no additional requirement that the predicate acts of racketeering be driven by a profit-seeking purpose. Indeed, several of the crimes specified in Section 1961(1)—such as murder, kidnapping and arson—do not require an intent to profit financially. The court of appeals' adoption of the economic motivation requirement is precisely the sort of creative RICO-limiting interpretation not intended by Congress that this Court con-

sistently has rejected. *See, e.g., H.J., Inc.* v. *Northwestern Bell Telephone Co.,* 492 U.S. 229 (1989); *Sedima, S.P.R.L.* v. *Imrex Co.,* 473 U.S. 479 (1985).

Third, although not necessary to the proper interpretation of the statute, the legislative history of RICO does not support the imposition of an economic motivation requirement. This history confirms the plain meaning of the statute that Congress intended RICO "to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways." *H.J.,* 492 U.S. at 248-49. Congress was concerned with the effects of organized criminal acts on victims—not with whether those acts were committed in pursuit of money, political power or some ideological cause. Criminal acts of violence should not be confused with legitimate forms of political expression. *See Wisconsin* v. *Mitchell,* 113 S. Ct. 2194, 2199 (1993).

Organized, violent attacks against medical professionals and researchers are a growing problem in our society for which the strongest legal remedies are necessary. RICO provides useful and appropriate remedies to address this problem.

ARGUMENT

THERE IS NO REQUIREMENT IN 18 U.S.C. § 1962(c) THAT EITHER THE ENTERPRISE OR ANY OF THE ACTS OF RACKETEERING MUST BE ECONOMICALLY MOTIVATED.

The court of appeals stated that its interpretation of Section 1962(c) as requiring an economic motive "is dictated by the terms of the statute." 968 F.2d at 629. *Amici* agree that the statutory language is and should be decisive in this case.[6] The language of a statute is "the most reliable evidence of its intent." *United States* v. *Turkette*, 452 U.S. 576, 593 (1981). Thus, "[t]he starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hospital* v. *Shalala*, —— U.S. ——, 113 S. Ct. 2151, 2157 (1993) (quoting *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). *See Estate of Cowart* v. *Nicklos Drilling*, —— U.S. ——, 112 S. Ct. 2589, 2594 (1992).

Contrary to the statement of the court of appeals, the language of the statute directly contradicts its interpretation. This Court has previously recognized that Section 1962(c) presents four—and only four—elements for proof of a violation. "A violation of § 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity . . . . *But the statute requires no more than this.*" *Sedima*, 473 U.S. at 496-97 (emphasis supplied). Concomitantly, this Court has consistently rejected attempts to introduce into RICO additional re-

[6] Section 1962(c) provides in its entirety as follows: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c).

quirements that lack any firm grounding in the statutory text. *See, e.g., id.* at 495 (rejecting "racketeering injury" requirement); *H.J., Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989) (rejecting "organized crime" requirement).

"Economic motivation" does not appear as a separate statutory requirement in Section 1962(c). Such a requirement can legitimately be said to exist, therefore, only if it inheres within one or more of the four express elements of a Section 1962(c) violation. Recognizing this principle, the court of appeals claimed to discover its "economic motivation" requirement within the parameters of two other express statutory elements: (1) a RICO "enterprise," and (2) "racketeering activity." But neither of these statutory terms provides a legitimate vehicle for the RICO limitation that respondents seek to import. To the contrary, a requirement of "economic motivation" is entirely foreign to the relevant statutory provisions.

A. A RICO "Enterprise" Does Not Require Economic Motivation.

1. The term "enterprise" is not left undefined or ambiguous in RICO. The statute explicitly defines this term as including "*any* individual, partnership, corporation, association, or other legal entity; and *any* union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis supplied). As this Court has observed, the statutory definition is expansive. *Russello* v. *United States*, 464 U.S. 16, 21 (1983); *United States* v. *Turkette*, 452 U.S. 576, 580-81, 587, 593 (1981); *Sedima*, 473 U.S. at 497-98 ("RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach but also of its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes' ") (citation omitted).

The breadth of this statutory definition is most apparent in its use of the word "any." As this Court has noted, "[t]here is no restriction upon the associations embraced by the definition," *Turkette*, 452 U.S. at 580, and also no uncertainty in the meaning of the term. *Id.* at 581. " '[A]ny' encompasses 'all.' " *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Cos.*, 498 U.S. 211, 223 (1991). In short, *any* legal entity or *any* association in fact can constitute an "enterprise" within the meaning of the Act.

2. Despite the apparent breadth of the statutory definition of "enterprise," the Second Circuit in *United States* v. *Ivic*, 700 F.2d 51, 60 (2d Cir. 1983), limited the application of this term to "profit-seeking ventures." Specifically, the court concluded in *Ivic* that "the term 'enterprise' . . . refers to the sort of entity in which funds can be invested and a property interest of some sort acquired, and hence the sort of entity which one joins to make money. Although perhaps somewhat wider in its reach than 'business,' an 'enterprise' . . . is evidently *an organized profit-seeking venture.*" *Id.* (emphasis supplied). The court below embraced this conclusion. It held that the term enterprise "conveys a restriction to economic entities." 968 F.2d at 628. It purported to find further support in this Court's occasional references to "businesses" when speaking about the enterprise concept.[7] 968 F.2d at 629.

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[7] The sole such reference cited by the court of appeals—contained within an excerpt from *H.J.*, 492 U.S. at 249—simply lacks the significance the court of appeals seeks to ascribe to it. The relevant portion of *H.J.* merely recapitulated the holding in *Sedima* that RICO was not intended to be limited only to mobsters but applies equally to "legitimate business" engaged in repeated criminal activity. A holding that RICO can be applied to "legitimate business" is hardly the same, however, as a holding that RICO applies *only* to businesses. Moreover, if Congress had intended that the term "enterprise" apply only to businesses, it could have inserted that single word, which it in fact used elsewhere in the statute. *See,*

This interpretation is squarely at odds with the statutory definition, which contains no restriction to "profit-seeking ventures." Moreover, no portion of the definitional language is susceptible to such an interpretive gloss. For example, the statute includes any "individual" as a qualifying enterprise—and individuals are not generally thought of as "profit-seeking ventures." *See McCullough* v. *Suter*, 757 F.2d 142 (7th Cir. 1985). Moreover, Section 1961(4)'s inclusion of "any legal entity" quite clearly encompasses such organizations as non-profit corporations or governmental institutions—neither of which have profits as their purpose. Indeed, the lower courts, including the Seventh Circuit, have consistently recognized that such entities qualify as RICO enterprises.[8] *See, e.g., United States* v. *Murphy*, 768 F.2d 1518, 1531 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986); *United States* v. *Angelilli*, 660 F.2d 23, 30-35 (2d Cir. 1981), *cert. denied*, 455 U.S. 910 (1982); *Averbach* v. *Rival Manufacturing Co.*, 809 F.2d 1016, 1018 (3d Cir.), *cert. denied*, 482 U.S. 915 (1987).

Nor does the statutory definition provide any greater warrant for imposing a "profit-seeking" requirement upon associational enterprises. *See Turkette*, 452 U.S. at 582 n.4. To be sure, an associational enterprise must be comprised of "a group of persons associated together for a

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e.g., § 1964(c) ("any person injured in his business or property"); § 1968(d) ("principal office or place of business"), f(2), (g) ("transacts business"). The fact that Congress did not do so, however, significantly undermines the reasoning of the court below. *See Turkette*, 452 U.S. at 581.

[8] The incongruity of requiring that a RICO enterprise must have profits as its purpose is even more apparent when it is understood that under RICO the enterprise is frequently *the victim* or passive tool of wrongdoers. *See Haroco* v. *American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 401 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985). Why the *victim*'s purposes or motivations should be at all relevant in determining the existence of a RICO violation is incomprehensible.

common purpose," *id.* at 583, but financial gain is only one of many potential types of common purpose. Nothing in § 1961(4) suggests that a financial purpose is the only purpose that suffices for an associational enterprise.[9] *See, e.g., United States* v. *Ellison*, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986) (white supremacist group as enterprise).

In sum, the definition of enterprise in Section 1961(4) unambiguously omits any requirement that an organization's conduct be motivated by a desire for economic gain. Even the Second Circuit, in commenting on its own ruling in *Ivic*, has recognized that "[s]ection 1961(4) appears to contemplate application of RICO to enterprises which, for example, are not themselves profit-making . . . . The situation reached by § 1962 may thus not always be one in which the enterprise 'makes money' for its members." *United States* v. *Bagaric*, 706 F.2d 42, 56 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983).

3. Because Section 1961(4) itself provides no support for a requirement that the enterprise be driven by a primary purpose of economic gain, the opinion below—like *Ivic*—virtually ignores this express statutory definition. Instead, both of these opinions attempted to infer the

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[9] *Ivic* attempted to reconcile its economic motivation requirement with *Turkette* by claiming that while *Turkette* "held that the term 'enterprise' as used in RICO encompasses illegitimate organizations, nothing there suggests that it reaches every such organization, even one whose animating long-run purpose and predicate crimes are political rather than pecuniary." *Ivic*, 700 F.2d at 63. *Accord* 968 F.2d at 627. However, this statement simply ignores *Turkette*'s conclusion, based upon an analysis of the statutory definition of enterprise, that "[t]here is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact." *Turkette*, 452 U.S. at 580. In short, *Turkette did* hold that every illegitimate organization qualifies as an enterprise, requiring only that the *existence* of an associational organization be demonstrated through proof of a common purpose, organization and continuity. *Id.* at 583.

meaning of "enterprise" as used in Section 1962(c) by examining the context in which the term is used in Sections 1962(a) or (b). *See Ivic*, 700 F.2d at 60-61; 968 F.2d at 627, 629. More specifically, they viewed Sections 1962(a) and (b) as implying an enterprise "in which funds can be invested and a property interest of some sort acquired, and hence the sort of entity which one joins to make money." *Ivic*, 700 F.2d at 60-61. They concluded that "enterprise" should be given "the same meaning" in subsection 1962(c). *Id.* This is the sole apparent basis for the court of appeals' holding "that this interpretation of § 1962(c) is dictated by the terms of the statute." 968 F.2d at 629.

This attempt to extrapolate a definition for the term enterprise as used in Section 1962(c) constitutes a wholly misguided exercise. The statute itself expressly supplies the relevant definition.

In any event, the premise of this argument—that the definition of enterprise must be modified within the context of Sections 1962(a) and (b)—is erroneous for at least three separate reasons. *First*, even if profit-seeking ventures were the only types of enterprises to which subsections (a) or (b) could be applied, this would not imply any alteration in or limitation of the statutory definition of "enterprise." "Language in a statute is not rendered superfluous merely because in some contexts that language may not be pertinent." *Turkette*, 452 U.S. at 583 n.5. Indeed, the court of appeals' argument on this point is strikingly similar to RICO-limiting arguments previously rejected by this Court.

For example, one of the arguments raised in support of the claim that "enterprise" should be limited to "legitimate organizations" was that various of the statutory remedies "would have utility only with respect to legitimate enterprises." *Id.* at 585. *See also Russello* v. *United States*, 464 U.S. 16, 24 (1984). But as this Court

recognized, "[e]ven if one or more of the civil remedies might be inapplicable to a particular illegitimate enterprise, this fact would not serve to limit the enterprise concept." *Turkette*, 452 U.S. at 585.

Second, and relatedly, to the extent that only certain types of enterprises are subject to Sections 1962(a) and (b), that is not because the definition of enterprise is altered as it applies in those sections. It is because those sections each impose additional unique requirements that are entirely absent from Section 1962(c). Thus, for example, it is the requirement of a use or investment of illegally derived income that potentially makes Section 1962(a) only applicable to certain enterprises. But that does not affect the core statutory definition of enterprise.

Third, the shorthand description of Sections 1962(a) and (b) that *Ivic* used to support its conclusion that "enterprise" in these sections refers to an "organized profit-seeking venture" is deeply flawed. *Ivic*, 700 F.2d at 60. These sections do not merely concern the investment of funds or the acquisition of interests in an enterprise. *Id.* Section 1962(a) also prohibits the use of certain funds to operate an enterprise—an activity which does not in any way require that the enterprise pursue profits. Similarly, Section 1962(b) prohibits the unlawful maintenance of control of an enterprise—again, not requiring a profit-seeking purpose. In short, the premise that Sections 1962(a) and (b) necessarily apply only to profit-seeking organizations is itself incorrect and ignores the statutory language.

B. RICO Does Not Impose Any Requirement That A Defendant's "Racketeering Activities" Be Economically Motivated.

1. Section 1961(1) of RICO states that "racketeering activity" "*means*" any act or threat that is unlawful under generically described state criminal laws or specified federal criminal provisions. 18 U.S.C. § 1961(1) (em-

phasis supplied). Other than enumerating the relevant federal statutes and state offenses, the statute provides no other restriction on the qualifying predicate acts. In particular, an "economic motivation" requirement cannot be found in, and is not added by, the definition of "racketeering activity." " '[R]acketeering activity' consists of no more and no less than commission of a predicate act." *Sedima,* 473 U.S. at 495. Because "racketeering activity" is expressly defined by reference to other statutes, proof of a racketeering act therefore requires only the same elements as would be necessary to be "chargeable," "indictable" or "punishable" under the underlying criminal statute. 18 U.S.C. § 1961(1). *See Northeast Women's Center, Inc.* v. *McMonagle,* 868 F.2d 1342, 1350 (3d Cir.), *cert. denied,* 493 U.S. 901 (1989).

Although some of these underlying criminal statutes may contain an economic element—for example, the federal statute relating to embezzlement or theft—others clearly do not. For example, Section 1961(1) includes as racketeering activity "*any* act or threat" involving murder, kidnapping or arson. 18 U.S.C. § 1961(1) (emphasis supplied). Indeed, the very line of Second Circuit decisions relied upon by the court of appeals here candidly concedes that:

> motive itself is not generally an element of a particular offense . . . . RICO demands no such inquiry. The offenses it proscribes are, in the main, activities punishable irrespective of motives for performance, and accordingly they are provable by showing mens rea in the typical fashion. *Hence, no additional scienter requirement is imposed by the statute.*

Bagaric, 706 F.2d at 53 (emphasis supplied).

Further, an economic motivation requirement is not necessary in order to distinguish acts of systematic illegality from legitimate forms of political expression. Vigilantes who take animals from medical research labora-

tories, harass and victimize health care providers, or otherwise engage in acts of lawlessness and mayhem deserve no special treatment by the courts simply because their crimes are motivated in part by their emotional commitment to a cause. *Cf. Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2199 (1993). Neither the terrorists responsible for the bombing of the World Trade Center nor the zealots involved in the murder of Dr. David Gunn should be shielded from RICO prosecution by the ideological purpose underlying their crimes. Organized acts of criminality are among the core concerns of RICO, and RICO remedies should be available to redress them.

2. Because Section 1961(1) contains no "economic motivation" requirement, and the predicate acts at issue here derive from criminal statutes that contain no such element,[10] the court of appeals' insistence upon "economically motivated predicate acts" lacks any grounding in the statutory language. 968 F.2d at 629. In fact, the court of appeals did not even attempt to identify any statutory language that could be said to apply an additional "economic motivation" requirement to "racketeering activity."

Instead, the court of appeals justified its adoption of an economic motivation requirement for predicate acts solely on the basis that this would advance the same purposes served by its "economically motivated enterprise" requirement. Concomitantly, notwithstanding its conclusion that the terms of the statute require that a RICO enterprise be economically motivated, the court of appeals

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[10] The court of appeals here, agreeing with the Third Circuit's decision in *Northeast Women's Center*, 868 F.2d at 1349-50, acknowledged that the Hobbs Act, 18 U.S.C. § 1951—which punishes obstruction of interstate commerce through extortionate means, and is one of the statutory provisions enumerated in Section 1961(1)—does not require that the defendant profit economically. 968 F.2d at 629 n.17. Many of the predicate acts pleaded by petitioners in this case consisted of alleged acts of extortion in violation of the Hobbs Act.

adopted the view that this requirement need not be adhered to in all circumstances. Relying upon *Bagaric,* 706 F.2d at 56, the court held it permissible to "extend[] the economic motivation limitation by allowing economically motivated predicate acts to bring conduct within the scope of RICO." 968 F.2d at 629. The court did not require, however, that predicate acts always be "economically motivated." In those instances where the enterprise is economically motivated, the predicate acts need not be. Conversely, in those instances where the enterprise is not economically motivated, economic motivation for the predicate acts is required. *Id.* at 628-30.

Although these alternative formulations obviously provide some degree of flexibility in interpretation, they also reveal the incoherence of the court's statutory analysis. If economic motivation were in fact a statutorily required element for an "enterprise," then that element could not be required in some cases and ignored in others—at least absent some statutory basis for distinguishing between the two types of cases. No court has ever purported, however, to locate such distinguishing language in the statutory text. Similarly, a requirement of economic motivation for predicate acts cannot come and go as convenience dictates.

In short, the court of appeals' acceptance of alternative methods of proving economic motivation merely confirms that it is *neither* the enterprise nor the predicate acts of racketeering activity that require economic motivation. Simply put, this requirement lacks any textual basis in the Act.

3. The imposition of a free-floating "economic motivation" requirement, untethered to any statutory language, is precisely the kind of creative RICO-limiting interpretation that this Court has repeatedly condemned. This additional concept appears nowhere in the statute and affirmatively contradicts the intentionally broad statutory definitions. There is no more room for this concept than there has been for previously invented limitations such as "organized crime," "previous conviction," "multiple

scheme" or "racketeering injury." *H.J.*, 492 U.S. at 241, 249; *Sedima*, 473 U.S. at 488-89, 494-95.

In any event, an "economic motivation" requirement poses a multitude of definitional problems, particularly as applied to predicate acts. For example:

- Must every predicate act forming a "pattern" of racketeering activity be economically motivated? Or is it enough if only some are?
- If non-economically motivated predicate acts are permitted to be included within a pattern, should remedies be available pertaining to these acts—*e.g.*, civil actions by direct victims?
- Is motivation really the test? Or must the crime itself directly involve the receipt of money or other financial gain, thereby giving it "an economic dimension"? *Bagaric*, 706 F.2d at 53 n.11.
- If an "economic dimension" is the requirement, how does one make sense of the numerous predicate acts set forth in § 1961(1) that do not involve receipt of money? For example, if acts which themselves lack an "economic dimension" are undertaken for economic purposes—*e.g.*, a series of murders to serve as "examples" to one's business competitors—does that suffice? [11]
- If motivation is the test, must the economic motive be predominant? Or is a secondary economic purpose sufficient? Is there a distinction between short-term and long-term motives? [12]

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[11] *Cf. United States* v. *Ellison*, 793 F.2d 942, 950 (8th Cir. 1986) (finding RICO pattern established where predicate acts produced no direct financial benefit but bolstered morale and commitment of members of white supremacist organization and furthered intentions to punish nonconforming groups).

[12] "An interpretation of RICO requiring proof of long-term pecuniary objectives which in some sense can be said to supersede accompanying political or religious ones would invite a repetition of this conduct. It would authorize the admission of evidence of political beliefs, racial animosities, and family and blood feuds as justifications for criminal acts." *Bagaric*, 706 F.2d at 55.

These issues represent just some of the thorny problems raised by the court of appeals' economic motivation requirement. They reveal that this requirement, divorced as it is from the statutory text, is every bit as amorphous and difficult to define as the other non-statutory additions that have been rejected by this Court. *Sedima*, 473 U.S. at 494-95; *H.J.*, 492 U.S. at 229 n.3 & 249. As in those instances, "the difficulty of that task [of definition] itself cautions against imposing such a requirement." *Sedima*, 473 U.S. at 495.

C. RICO's Legislative History And Purposes Do Not Justify Inserting An Economic Motivation Requirement Into The Terms Of The Statute.

1. Because this is a case where the terms of the statute make plain its meaning, no examination of the legislative history is necessary. "Congress' 'inklings' are best determined by the statutory language that it chooses, and the language it chose here extends far beyond the limits drawn by the Court of Appeals." *Sedima*, 473 U.S. at 495 n.13. The statutory language is itself decisive.

In any event, nothing in the legislative history supports the view that RICO was intended not to apply to persistent, systematically organized criminal conduct undertaken with non-economic motives. To the contrary, at least one member of Congress opposed to the legislation appears to have specifically envisioned the possibility that it would be applied to politically motivated groups: "We must remember that henceforth the term 'racketeering activity' is given very broad definition and very well could extend to some of our labor unions *and very definitely to counterrevolutionary activities.*" 116 Cong. Rec. 35326 (1970) (remarks of Rep. Rarich).

Proponents of an "economic motive" requirement point to the fact that much of the impetus for RICO derived from a concern about organized crime's ability to procure illegal profits, particularly as a result of mob infiltration of legitimate businesses. *See, e.g., Ivic*, 700 F.2d at 61-

65. RICO, it was hoped, would take the profit out of organized crime. All of this is undeniable, but wholly inadequate to support the holding below.

A desire to cripple organized crime and strip it of its profits may have provided the immediate impetus for congressional action. But this fact does not create any negative implication about RICO's intended sweep. *Cf. Turkette*, 452 U.S. at 591. This Court has emphasized that RICO's intended scope should not be confused with the reasons for its passage.

> The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute . . . .
>
> Congress drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways.

H.J., 492 U.S. at 249-50. *See also id.* at 245-46 ("Congress was quite capable of conceiving of 'pattern' as a flexible concept not dependent on tying predicates to the major objective of the law").

Regardless of whether it was specifically anticipated that RICO might be applied to terrorist organizations operating with ideological or political motives, what matters is that Congress acted deliberately in adopting a statute employing broad terms capable of such application. " '[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.' " *Sedima*, 473 U.S. at 499 (quoting *Haroco, Inc.* v. *American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (7th Cir. 1984)).

2. When it enacted RICO at Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941, Congress provided an explicit declaration of its purposes that was no less broad than the statute

itself. In a preface to the Organized Crime Control Act of 1970, Congress first made certain "findings" regarding the perceived problems that had occasioned the need for the legislation.[13] 84 Stat. 922-23. It then proceeded to state the purpose of the legislation. That purpose was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." 84 Stat. 923. In sum, RICO's purposes were "to supplement old remedies and develop new methods for fighting crime." *Sedima*, 473 U.S. at 498.

RICO remedies are necessary to combat the disturbing trend of vigilantism and violence against medical practitioners and researchers. During the last eight years, over a dozen health care workers or researchers have been murdered on the job.[14] There have been more than 100 incidents of vandalism, arson or theft by animal rights activists.[15] In many cases, these criminal acts have been performed by, or with the assistance of, well-funded and tightly organized enterprises formed for the very purpose of engaging in medical vigilantism.

An "economic motive" requirement would artifically place whole areas of organized criminal activity beyond

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[13] These findings focused in large measure on the deleterious *effects* of organized crime, not on the criminals' motivations. Moreover, the findings referred not only to the harmful economic effects of these criminal activities ("weaken the stability of the Nation's economic system, harm innocent investors and competing organizations . . . serious burden on interstate and foreign commerce") but also to their harmful effects on safety and welfare ("threaten the domestic security, and undermine the general welfare of the Nation and its citizens"). 84 Stat. 922-23. In short, the kinds of harmful effects that concerned Congress certainly are broad enough to include the effects of the organized criminal activity alleged by petitioners here.

[14] J. Adams, "After Second Bombing, FBI Warns Academics," *Chicago Tribune* (June 25, 1993), at 2.

[15] *Id.*

the reach of RICO. Such a result is inconsistent with the statute's language and purposes. As Justice Stevens has pointed out, political terrorism merits no special solicitude. *United States* v. *Cullen*, 454 F.2d 386, 392 (7th Cir. 1971) ("Appellant's professed unselfish motivation, rather than a justification, actually identifies a form of arrogance which organized society cannot tolerate"). And the devastating impact that such criminal acts have on medical practice and research cannot be condoned simply because the acts are committed in the name of some supposedly higher justification.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Of Counsel:
KIRK B. JOHNSON
EDWARD B. HIRSHFELD
MICHAEL L. ILE
AMERICAN MEDICAL ASSOCIATION
515 North State Street
Chicago, Illinois 60610
(312) 464-5000

ANN E. ALLEN
AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS
409 12th Street, S.W.
Washington, D.C. 20024
(202) 638-5577

JACK R. BIERIG *
DAVID F. GRAHAM
RICHARD D. RASKIN
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Attorneys for Amici Curiae American Medical Association and American College of Obstetricians and Gynecologists

* Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

—v.—

JOSEPH M. SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE ACTION LEAGUE INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE AND OPERATION RESCUE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE NATIONAL NETWORK OF ABORTION FUNDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Kathryn Kolbert*
Eve C. Gartner
Center for Reproductive Law & Policy
120 Wall Street
New York, New York 10005
(212) 514-5534
Counsel for Amici Curiae

*Counsel of Record

Dated: August 13, 1993

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993
No. 92-780

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

v.

JOSEPH M. SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE ACTION LEAGUE INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE AND OPERATION RESCUE,

Respondents.

On Appeal from the United States Court of Appeals
for the Seventh Circuit

BRIEF OF THE NATIONAL NETWORK OF ABORTION FUNDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This *amici curiae* brief is submitted in support of petitioners National Organization for Women, Inc., et al. By letters filed with the Clerk of the Court, petitioners and respondents have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

The National Network of Abortion Funds (NNAF) is a coalition of 23 non-profit community-based groups that provide financial assistance to low-income women denied access to abortion by federal and state Medicaid funding bans. As a national network organized to ensure low-income women's access to reproductive health care, *amici curiae* have a particular interest in halting the concerted violence, harassment and intimidation being directed against women seeking abortions and against physicians and clinics providing abortion services.

Low-income women rely heavily on clinics and clinic personnel -- the most likely targets of anti-choice zealots -- for reproductive health care, as very few of these women have access to private physicians and clinics provide services at lower cost. In addition, because low-income women already face numerous obstacles to obtaining health care, they are impacted more severely by respondents' campaign of violence and intimidation than are other women. *Amici curiae* have experienced first hand the hardships that result from a lack of federal support for women's access to abortion, and thus are acutely concerned that the federal protection against clinic violence provided by the Racketeer Influenced and Corrupt Organizations Act ("RICO") not be eviscerated.

SUMMARY OF ARGUMENT

The Court of Appeals for the Seventh Circuit incorrectly construed the scope and applicability of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). As

explained in Points I and II, respondents are engaged in a nationwide campaign of violence, harassment, and threats against doctors and clinics who provide abortions, and women who seek them. In direct response to this organized effort, increasingly few doctors are willing to perform abortions and many women are reluctant to go to clinics to obtain even medically necessary abortions, thus jeopardizing women's health and thwarting the right to choose abortion. It is essential that respondents' violent and unlawful activities directed against women, doctors and clinics be stopped. As explained in Points III through V, RICO provides the necessary federal legislative response to the violence and harassment.[1] Thus, in accordance with RICO's mandate that it be construed liberally, and in order to put an end to this national crisis of lawlessness and violence, this Court must reverse the decision of the Court of Appeals.

ARGUMENT

I. VIOLENCE, HARASSMENT AND INTIMIDATION DIRECTED AT WOMEN SEEKING ABORTIONS, PHYSICIANS, AND CLINICS ARE PERVASIVE.

Since *Roe v. Wade*, 410 U.S. 113 (1973), the landmark decision finding constitutional protection for the right to choose abortion, anti-choice zealots have sought to make abortion a crime, or, at the very least, unavailable. While some anti-choice organizations and individuals have adopted lawful methods, such as legislative initiatives and nonviolent protest, a large and continually increasing number rely on extreme acts that range from large and sometimes violent blockades and clinic invasions to serious criminal activity. In

---

[1]Moreover, even under the most liberal construction of RICO, the argument that RICO could be used against protected speech is specious, as the statute reaches only criminal conduct, and any RICO violation is predicated on already criminalized activity.

all of its forms, anti-choice activity has become pervasive. Moreover, mere protest is not at issue here, but rather "reprehensible," *National Organization for Women v. Scheidler*, 968 F.2d 612, 621, 630 (7th Cir. 1992), organized, criminal, activity,[2] activity that, if left unchecked, will eviscerate the right to choose abortion as surely as a criminal ban. RICO defines "racketeering activity" as "(A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs . . ." 18 U.S.C. § 1961(1)(1988) (emphasis added). As shown below and as detailed in petitioners' complaint, the activities of anti-choice extremists, such as respondents, plainly constitute a "pattern of racketeering activity" within the meaning of RICO.

A. Threats and Violent Actions Against Abortion Clinics Are Severe.

Violence at clinics throughout the United States is a matter of grave importance. Testimony presented to Congress at hearings held by the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary in 1985 and 1986 (the "1985-86 Hearings"), some of which is excerpted below, illustrates the criminal nature of respondents' activities and the siege-like atmosphere in which clinics have been forced to provide health care to women.

---

[2]As the Seventh Circuit recognized:

> the complaint does not attempt to bar all anti-abortion activities. Peaceful picketing, debate, meetings, prayers, and a host of other forms of peaceful protest, are protected by the First Amendment. The complaint seeks relief from criminal and tortious activities such as trespass, clinic invasion, vandalism, extortion, and tortious interference with business relationships.

968 F.2d at 616.

For example, Heather Green, Director of Community Education at the Hillcrest Clinics in Norfolk, Virginia testified:

> Since we are the only facility in our area which provides abortion services, we have become the target for antiabortion violence and harassment.
>
> On May 26, 1983, an arsonist broke into our clinic and set fire to our facilities. The damages were approximately $150,000 and the clinic was closed for 20 days. Twenty customers of the Navy Federal Credit Union, which is another tenant in the building, were unable to close on their home mortgages that day, and Sovran Bank, which is below the clinic, suffered severe water damage.
>
> . . .
>
> After filing [a civil suit to enjoin the trespassing, etc.], we had an increased number of telephone harassments, hate mail, and bomb threats. On February 17, 1984, a bomb exploded outside of our building. . . . 1 of 7 pipe bombs exploded, and damage resulted to the bank downstairs . . .
>
> Our employees suffered nightmares as a result of these activities. Our administrator was forced to flee her home for a weekend because the local authorities did not feel her home was a safe place to be. We have a 24-hour security guard which costs $4,000 a month. And we have had women who would refuse to come to our clinic because of the picketing and the bombings which have occurred. They are afraid to come to the clinic and travel a distance of 40 miles to the next clinic.

1985-86 Hearings at 7-8. The arson described by Ms. Green is plainly a predicate act under RICO. In addition, the arson, the bombing and the bomb threats constitute the RICO predicate act of "extortion" in that they are an attempt to close and/or take business away from the clinics through the "wrongful use of actual or threatened force, violence, or fear," in violation of

the Hobbs Act, 18 U.S.C. § 1951(1).[3]

Ms. Beverly Whipple, Executive Director of the Feminist Women's Health Center of Yakima, Washington testified:

> Most of the experiences that I am going to describe took place during an 8-month period between August of 1983, the time that the Everett clinic opened, and April of 1984, when the clinic was forced to close after the third fire. Two of those months the clinic was closed for repairs after the first fire.
>
> . . .
>
> At one point there was an actual, physical confrontation and assault with a picket sign. In one instance the pickets interferred [sic] with an ambulance transport to a hospital. The picketers created a situation that made it more difficult for the ambulance attendants to transport the patient. In addition, the picketers were taking pictures of the patient while she was being transported. When the attendants asked them not to do it, they continued to do so.
>
> . . .
>
> This went on daily for 2 months. . . . [A]t least one letter threatened our person and advised us to carry guns. It mentioned that car bombs may be next. In a 2-week period in Yakima there were two attempted break-ins. In a 4-week period in Yakima there were four staff cars vandalized.
>
> . . .
>
> Over a 2-day period, 132 calls were traced to one residence. During an injunction hearing . . ., the man to whom the phone was listed denied making the calls.

---

[3]The Third Circuit Court of Appeals correctly held that the Hobbs Act does not require that extortion have an economic motivation. *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989).

> A bomb threat was received. The caller said the clinic would be blown to bits in 3 minutes.
>
> After the first fire, December 3[, 1983], we hired off-duty police officers for building security. Two days later we were informed that our use of off-duty police would be discontinued due to the abortion situation and there was a need for them to remain neutral in this case and not to take sides. After three fires, however, when we no longer had a clinic, the mayor had changed his position on this issue.

1985-86 Hearings at 23-24. The three incidents of arson and the bomb threats described by Ms. Whipple constitute "racketeering activity" within the meaning of RICO, 18 U.S.C. § 1961(1).

Mary Bannecker, Administrator of the Northeast Women's Center in Philadelphia, Pennsylvania, testified:

> I have personally observed women's arms being grabbed when they have refused to acknowledge the picketers or pleaded with them to be left alone. Their arms are grabbed as these picketers are screaming within inches of their face, ...
>
> . . .
>
> [O]n December 8, [1983], 31 people trampled into the clinic, literally treading on me as they ran up the steps to the third floor . . . [T]hey shoved the office manager so that about 11 of them could get to the rear of the clinic.
>
> One of the men that had entered the building . . . repeatedly hit the lab technician with the door, because she was preventing him from entering the lab because a 15-year old teen was in the lab. She sustained bruises and cuts, and a strained back. She was unable to return to work for 2 weeks and did return against medical advice. The 31 people that came into the clinic had to literally be carried out of the building by the police.

> During the following week we received three bomb threats. One of the bomb threats, we evacuated the building, and one of the people who was evacuated was a woman who had just had an abortion completed under general anesthesia and had to be carried out on a gurney, and literally awoke in the parking lot of the building.
>
> . . .
>
> It is already a highly stressful job because they're working with women in crises, and now they have the threat of violence hanging over their head. This fear and anguish is compounded by the women who are seeking our services. These women who choose to terminate their pregnancies do not do so either carelessly or casually. Screams and physical assaults only add to their distress and emotional turmoil. They enter the clinic visibly shaken and upset. What is so frightening is that the antiabortionists are neither passive nor nonviolent.

1985-86 Hearings at 5-7. The bomb threats and the threats and attacks of physical violence to people and property for the purpose of scaring away the clinic's patients and/or shutting down the clinic, as described by Ms. Bannecker, are predicate acts of racketeering activity under RICO.

In recent months, opponents of legal abortion have become even more violent and threatening. On March 10, 1993, Dr. David Gunn, a Florida abortion provider who had been subjected to repeated harassment, was shot three times in the back and killed as he was entering a Pensacola, Florida clinic.[4] This murder, by itself a tragedy, is symptomatic of the escalating pattern of violence.[5] In response to the increasingly widespread and organized violence against abortion clinics and providers, Congress held two sets of

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[4]Dr. Gunn's murderer frequently harassed patients outside of clinics.

[5]Murder, too, is a predicate act under RICO. 18 U.S.C. § 1961(1)(A).

hearings regarding federal remedies to stop clinic violence and to protect women's access to abortion services. *See* Senate Comm. on Labor and Human Resources (hearing on S. 636, the Freedom of Access to Clinic Entrances Act of 1993) (May 12, 1993) (the "1993 Senate Hearings");[6] House Judiciary Comm., Subcommittee on Crime and Criminal Justice (the "1993 House Hearings"). The following excerpts of testimony given at those hearings provides a view of the worsening conditions under which women's health care clinics are attempting to provide services.

Willa Craig, Executive Director of the Blue Mountain Clinic in Missoula, Montana, testified that on March 29, 1993, the clinic was burned to the ground in an arson attack.[7] Because of the lack of medical office space in Western Montana, since the fire, the clinic's internist is able to see only about 40% of her usual number of patients; no new patients are being accepted, particularly no new prenatal patients, and pediatric care is completely on hold. 1993 Senate Hearings, Craig Testimony at 2. According to Craig:

> [t]his act of devastating violence was the culmination of several years of escalating crimes against the clinic and its staff as providers of abortion. . . . In the past four years, . . . things have changed dramatically. The number of protestors has increased and the character of the

---

[6]The proposed legislation, the Freedom of Access to Clinic Entrances Act (FACE), currently moving through Congress, is designed to combat the recent increase in violence against abortion providers. FACE, however, is a supplemental remedy and does not relieve the courts of their duty to enforce existing law.

[7]At the Blue Mountain Clinic, abortion services comprise less than 20% of the total patient visits per month. 1993 Senate Hearings, Craig Testimony at 2. The arson attack bore similarities to a 1992 arson that extensively damaged a Planned Parenthood clinic in Helena, Montana. Id.

> demonstrations has consistently required police involvement. Picketers who once appeared satisfied to walk back and forth in front of our office with signs were joined by individuals who on a weekly basis blocked driveways, screamed at staff, and interfered with patients attempting to enter our facility.
>
> Beginning in November of 1989, protests at the clinic became routine and a group of leaders emerged, calling themselves "Rescue Montana." This group advertised publicly its intentions to recruit anti-choice protesters who would willingly and knowingly break the law. They arrange training of new recruits in Montana by nationally known offenders and themselves travel out of state to participate in "rescues" such as the massive demonstration in Wichita.
>
> In November of 1991, "Rescue Montana" announced publicly that it would blockade a clinic that week. . . . The demonstration and blockade that took place that week involved approximately 80 protestors, 31 of which were eventually arrested. Few were from our community.
>
> During the protest the clinic was very nearly invaded by a group of large men and a staff person received minor injuries in the scuffle to prevent the invasion. Ending the blockade required the fire department, including the "jaws of life," six units of the city police, and the county sheriffs department. The resulting trial in municipal court lasted more than five days and cost the city thousands of dollars. In the time period between these convictions and the arson that destroyed our clinic, many of those convicted returned, and participated in further disturbances.

Id. at 2-4. Arson and threats and commission of physical violence for the purpose of putting the clinic out of business, as described by Ms. Craig, constitute predicate acts under RICO.

John E. Cowles, an attorney in Wichita,[8] Kansas testified regarding the clinic blockades and other tactics used by respondent Operation Rescue and other groups in Wichita in the summer of 1991. Cowles reported that when the clinics obtained and served a temporary restraining order on respondent Randall Terry:

> [Terry] threw it to the ground . . . [and] told his followers that injunctions were to be used as toilet paper and that the marshals could send the injunctions to hell along with the judge that had signed it. He called the federal judge a 'nazi,' and Operation Rescue leaders later distributed both the office and home telephone numbers of Chief Judge Patrick Kelly, who had signed the order.
>
> Judge Kelly called a meeting in his chambers where he implored the mayor and city manager to authorize city police to protect access to the clinics by enforcing municipal trespass ordinances. They refused. Meanwhile, the blockades prevented access to the clinic for an entire week, and the leaders announced they had decided to stay the entire summer. The Governor of Kansas accepted an invitation to attend an Operation Rescue rally, where she encouraged their efforts. The telephone campaign against Judge Kelly became more ominous when death threats were received. Two federal marshals were assigned to put Judge Kelly under constant protection and new security devices were added to his chambers.

1993 House Hearings, Cowles Testimony at 2-3. The threats of physical violence against Judge Kelly are clearly predicate acts under RICO.

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[8]John E. Cowles is an attorney with McDonald, Tinker, Skaer, Quinn and Herrington, P.A. in Wichita, Kansas. He filed an action and received a temporary restraining order against anti-choice protesters at Women's Health Care Services in Wichita.

This violent conspiracy aimed at shutting down clinics through arson, blockades, intimidation, and other criminal means, has a devastating effect on access for low-income women. Rural low-income women, low-income women with children who must arrange for childcare, and the working poor with little or no flexibility at their places of employment are particularly burdened by being forced to make additional trips to clinics that are forced to shut down temporarily due to blockades, arson or other violence.

B. Physicians Who Provide Abortion Services Also Are Subject to Threats and Violence.

In addition, anti-choice militants are engaged in an organized campaign to threaten, stalk and assault physicians.[9] Frank Snydle, M.D., an obstetrician-gynecologist who performs abortions in Florida has been followed home repeatedly, had his car windows smashed, and "wanted" posters featuring a $1,000 reward for information leading to revocation of his medical license have been widely circulated in central Florida. Abortion Foes, *supra.* The posters also include the address and phone number of his 80-year old mother. Shortly after the campaign against Dr. Snydle began, his mother received a telephone call at 3:00 a.m. from someone identifying himself as a highway patrol trooper, who told her that her son had been killed in a car accident. *Id.*

Testimony presented to Congress this year made palpable the pervasiveness of respondents' campaign against physicians and the fear that their terrorist techniques have engendered. Susan Hill, President of the National Women's Health

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[9]For example, Operation Rescue leader respondent Randall Terry actively encourages harassment of medical staff. Terry has stated that "the doctor is the weak link," and has incited his followers to "do everything we can to torment these people." Abortion Foes Strike at Doctors' Home Lives, *Washington Post*, April 8, 1993, A1 at A17.

Organization, testified regarding the murder of Dr. Gunn:

> Dr. David Gunn had worked with our Columbus, Georgia clinic since 1985. I received a phone call on March 10, 1993, with a simple frightening message, "They shot Dr. Gunn. He is dead." In reflecting on this moment, I realize that the shocking thing about the message was not the incident; it was that for a moment I thought it was about two other physicians who had been living under death threats for months. We had believed that Dr. Gunn was in less danger than five of our staff physicians.

1993 House Hearings, Hill Testimony at 1.

Several physicians who perform abortion procedures also testified. Pablo Rodriguez, M.D.,[10] asking the Senate "to walk just a few yards in my shoes and feel what thousands of health care providers across the country feel every day of their lives," 1993 Senate Hearings, Rodriguez Testimony at 2, described the following occurrences:

> In the beginning, the harassment was the usual nasty letter and graphic pictures of dismembered fetuses; but slowly it became more aggressive. I began receiving strange packages with dolls inside, as well as subscriptions to gun magazines and hunting lodges, showing pictures of dead animals hanging by their extremities. Then the "Wanted Posters" began to appear . . . Copies of this hideous poster were also sent to my wife at home and to my office. Then the doors and locks to our clinic were glued on multiple occasions culminating with three

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[10]Dr. Rodriguez is a clinical assistant professor of Obstetrics and Gynecology at Brown University Medical School, a fellow of the American College of Obstetricians and Gynecologists, and the Medical Director of Planned Parenthood of Rhode Island.

episodes of forceful blockading of our clinic. . . . The day Dr. Gunn was shot, I knew that my life would irrevocably change.

One week after his death, as I was driving my mother to the bus station, I realized that my car was steering poorly. Once I dropped her off, I examined my tires and found that there were 45 nails deeply embedded in them; a fortunate finding considering that I was driving over 50 miles an hour on the highway. That evening, when I returned home, still unaware of the location of this act of vandalism, my wife painfully discovered with her foot that my driveway was "booby-trapped" with roofing nails cleverly buried under the snow. An image of my young children running and skinning their knees on that same section of driveway has filled my heart with a fear that, until this day, I have not been able to shake off.

The response from the police in my community was that they could not help and in view of the events in Florida, they recommended a bullet-proof vest.

The following week I received a bill for an insurance policy on my wife's life [which we had not applied for.]

Id. at 3-4.[11]

Norman T. To[illegible]ins, M.D., an obstetrician-gynecologist in private practice in Dallas, Texas, testified before the House Committee and submitted documents that had been filed on his behalf in a Texas lawsuit seeking a temporary injunction against the anti-choice zealots who have targeted him.[12] The

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[11]The shocking acts taken to coerce Dr. Rodriguez to stop performing abortion procedures, an integral part of his medical practice, fall squarely within the Hobbs Act.

[12]Three physicians in Dallas stopped performing abortions since April 1992 after they were pressured by an antiabortion group. Abortion Foes at A-17.

legal documents submitted by Dr. Tompkins show that:

• individuals associated with the Dallas Pro-Life Action Network ("Dallas PLAN")[13] threatened Dr. Tompkins with destroying his private practice if he didn't agree to stop performing abortions;[14]

• the President and owner of Dallas PLAN sent a letter to Dr. Tompkins on Dallas PLAN stationary following up on the demand;

• after Dr. Tompkins refused to give in to this ultimatum, he and his wife began to receive graphic postcards at their home and places of employment, with messages such as "Obviously you don't know what a real 'terrorist' is. Perhaps someday soon you will. Think not that I am come to send peace on earth: I came not to send peace, but a sword.";

• the individuals associated with Dallas PLAN have followed the Tompkins' car on several occasions, kept their homes under near-constant surveillance, shouted at them as they left their driveway, confronted them inside their church, filled their mailbox with threatening and harassing mail, made five to 15 harassing telephone calls per day at all hours of the day and night, and inundated

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[13]Dallas PLAN is affiliated with Rescue America. A Tale of 2 Dallas Abortion Doctors: One Surrendered, One Is Fighting On, *Washington Post*, April 8, 1993 at A-16.

[14]Another Dallas obstetrician, Dr. Clay Alexander, gave in to Dallas PLAN's demands, signing a letter saying he would never perform another abortion, and providing Dallas PLAN with a passport-quality photograph of himself for the organization's files. A Tale of 2 Dallas Abortion Doctors: One Surrendered, One Is Fighting On, *Washington Post*, April 8, 1993 at A16.

their answering machines with messages designed to provoke their anger and fear;[15]

In addition, at the 1985-86 Hearings, Philip Stubblefield, M.D.[16] testified:

> My colleague, Dr. Peter Bours, who has a practice in Forest Grove, Oregon, at one point felt it necessary to move his family to an undisclosed location, as a result of daily confrontations and threats at his facility. Clinic administrators in an Oklahoma city call the NAF office for advice, afraid they are about to lose their doctors discouraged by daily home picketing or threats to the hospital where they have admitting privileges. My friend and esteemed colleague, Dr. Baird Bardarson of Renton, Washington was slapped with criminal assault charges after he confronted a trespassing, long-time picketer outside his office. Although months later a jury threw out the assault charges after only 30 minutes of deliberation, the anxiety and pain experienced by the physician during those months was immeasurable. Imagine, also, the emotion experienced by a doctor in a small East-Coast city, who returned to his clinic one morning after delivering a baby, only to find that someone had (falsely) left a message on his answering machine that one of his children was lying dead in the coroner's office.

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[15]Because of the death threats Dr. Tompkins has received, he wears a bullet-proof vest and has hired bodyguards. A Tale of 2 Dallas Abortion Doctors: One Surrendered, One Is Fighting On, *Washington Post*, April 8, 1993 at A16.

[16]Dr. Stubblefield is Chief of Obstetrics and Gynecology at Mount Auburn Hospital in Cambridge, Massachusetts, Associate Professor of Obstetrics and Gynecology at the Harvard Medical School, and a past president of the Planned Parenthood League of Massachusetts and a past president of the Board of the National Abortion Federation ("NAF").

1985-86 Hearings at 251-52.

The shortage of physicians willing to provide abortions leads to an increase in cost and a dearth of services, making reproductive health care unavailable to increasing numbers of women who then turn to *amici curiae*, NNAF, abortion funds for financial assistance. Moreover, as a matter of law, policy and fundamental fairness, medical professionals should not have to put up with violence, extortion, death threats, or threats against their children and spouses as the price for providing health care to women.

C. Protests and Violence Have Increased Since *Planned Parenthood v. Casey* and *Bray v. Alexandria Women's Health Clinic*

The increasingly desperate acts of anti-choice groups are in part a reaction to this Court's decision in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), that makes clear that states may not ban abortion. Having failed to see *Roe v. Wade* overturned or the Human Life Amendment passed, the anti-choice forces have shifted their focus toward preventing abortion by denying women access to abortion services and driving physicians out of the profession by extortion and threats of violence.[17] Anti-choice activities at clinics has also increased since this Court's ruling in *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), which some

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[17]Respondent Scheidler has stated:

> We haven't been successful in getting the Human Life Amendment passed or in getting *Roe* overturned. When you get doctors out, you can have all the laws on the books you want and it doesn't mean a thing.

Abortion Foes Strike at Doctors' Home Lives, *Washington Post*, April 8, 1993, A1 at A17.

anti-choice extremists have apparently interpreted as a message that their methods are not actionable under federal law.

For example, John E. Cowles, Esq. testified before Congress that:

> [*since* the clinic blockades in Wichita in the summer of 1991] the most intense harassment efforts by protestors have been directed against physicians . . . In addition to telephoned death threats and bomb threats to the clinics, protestors have invaded two of the three Wichita clinics, spray painted buildings, thrown stink bombs at ventilation units, glued locks, chained gates, turned off utilities, knocked down fences, and pitched thousands of tiny nails or tacks into the driveways and parking lots of the clinics. When a physician leaves, he or she is often followed and protestors swerve their automobiles or stop suddenly trying to create an accident or force the physician off the road. One physician wears a bullet-proof vest and has purchased a trained guard dog to accompany him around the clock. For several days, protestors camped out across the street from one physician's residence, shooting off fireworks through the night, shining lights at the residence and using a bullhorn to broadcast obscenities. Protestors followed physicians to church and disrupted services on two occasions. Protestors stalked physicians in the residency program at Wesley Hospital in Wichita, and followed them to their homes, ...

1993 House Hearings, Cowles Testimony at 3-4.[18]

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[18]Statistics compiled by the National Abortion Federation (NAF) confirm the recent dramatic increase in reported incidents of harassment and violence against abortion providers and women seeking abortion. For example, between 1991 and 1992, reports of attempted bombing and arson incidents at clinics increased from one to 9; reports of vandalism

(continued...)

In sum, despite the fact that the right to choose abortion has been constitutionally protected for twenty years, testimony before Congress shows that criminal violence and threats against clinics and physicians who perform abortions are widespread and have worsened as an organized network of abortion opponents strives, virtually unchecked, to eliminate abortion as a choice for women. Moreover, the testimony shows that much of the criminal anti-choice activity constitutes predicate acts of racketeering activity under RICO.

II. THE RESPONDENTS' ORGANIZED CAMPAIGN OF VIOLENCE AND INTIMIDATION SERIOUSLY JEOPARDIZES WOMEN'S ACCESS TO ABORTION.

The respondents' concerted efforts to extort physicians from providing abortion services has been effective: this country faces a dire shortage of physicians who provide abortions, resulting in increased cost, severe impacts on women's health and curtailment of their ability to choose abortion.

A. As A Direct Result of Violence and Threats, the

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[18](...continued)
increased from 44 to 115; reports of clinic blockades increased from 41 to 81; reports of arson incidents at abortion clinics rose from 10 to 13. National Abortion Federation, Incidents of Violence and Disruption Against Abortion Providers, 1992. In the first five months of 1993 there has already been a shocking increase in violent attacks on clinics and abortion providers. In addition to the murder of Dr. Gunn, six clinics have reported invasions by antiabortion militants who stormed the clinics, destroyed equipment and in some instances physically assaulted clinic staff. National Abortion Federation, Summary of Extreme Violence Against Abortion Providers as of June 1, 1993: Other Reported Incidents of Serious Violence, 1993. Twelve clinics reported chemical attacks, one in which a patient and a clinic staff member required medical treatment and five clinics have reported arson. *Id.*

Number of Abortion Providers Has Decreased Substantially In the Past Several Years.

During the last two decades, there has been a steady decline in the number of facilities and clinicians willing to provide abortion services. The decline in the number of abortion providers is directly attributable to organized efforts by extremist anti-choice organizations and individuals.[19] Since Dr. Gunn's slaying, at least eight physicians have stopped performing abortions.[20] As early as 1985, Dr. Stubblefield testified before Congress that:

> [He had] seen what aggression directed against other physicians has done to the facilities with which I have been affiliated. The Planned Parenthood League of Massachusetts, at its Worcester, Massachusetts facility, lost two very able Medical Directors as a result of harassment. One Director, a fine young physician who also had a private practice in Boston, felt compelled to resign after picketers came to his private practice every day, passing out literature containing his home address and telephone number. The threatening phone calls to his home were frightening to him, his wife and young children. The second physician, a very active and competent director, felt compelled to resign after he too received threats that his private office would be bombed, and after his children received written threats while they were at school. In the course of dealing with this crisis, I

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[19]In addition, as a direct result of the organized harassment, clinics are finding it nearly impossible to fill physician positions. See Abortion Clinics Seek Doctors But Find Few, *New York Times*, March 31, 1993 at A-14; The Dearth of Abortion Doctors, *Washington Post* (Health), April 20, 1992 at 7.

[20]Doctors Say Abortion Foes Intimidating, *USA Today*, April 13, 1993 at 2A.

> served twice as acting Medical Director for the Worcester clinic. . . . I too . . . received written threats, . . .

1985-86 Hearings at 250-51.

Today, abortion services are available in only 17 percent of the counties in the United States.[21] Stanley K. Henshaw & Jennifer Van Vort, Abortion Services in the United States, 1987 and 1988, 22 *Fam. Plan. Persp.* 102, 106 (1990). Only 7 percent of the counties in rural areas have an abortion provider. *Id.* at 106. Thirty-one percent of women of childbearing age live in a county in which no abortion services are available. *Id.* at 106. The lack of services has the greatest impact on low-income, rural, or young women. Women without the resources to travel to a provider -- or to pay for the procedure -- are more likely to obtain an abortion later in their pregnancies, when health risks are significantly greater and costs for the procedure are substantially higher, or to be forced to carry an unwanted pregnancy to term.

B. The Shortage of Providers and the Fear of Violence and Harassment at Clinics Pose a Significant Threat to Low-Income Women's Health.

As stated above, it is beyond debate that low-income women have far less access to the health care system than middle and high-income women. These women already face delays in obtaining critical health care because of an overloaded and inadequate Medicaid system. This problem is particularly acute as to abortion because Medicaid does not

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[21]In addition, fewer and fewer doctors are willing to provide later abortions, which are most often required in cases where the woman is young or low-income, or the fetus is anomalous. Carolyn Westhoff, M.D., Residency Training in Contraception, Sterilization and Abortion, *Obstetrics & Gynecology*, Vol. 81 No. 2, Feb. 1993.

provide reimbursement for this service in the overwhelming majority of states.

Thus, the violence, intimidation, coercion, extortion, and other criminal activities engaged in by respondents has a particularly severe effect on this community of women. It causes additional delay, reduced services, and outright physical and psychological obstacles under circumstances where low-income women already obtain a disproportionate number of riskier second trimester as opposed to first trimester abortions. Henshaw & Wallisch, The Medicaid Cutoff and Abortion Services for the Poor, 16 Fam. Plan. Persp. 170, 178 (1984). Moreover, the poverty and violence in these women's lives also subject them to high levels of stress, which is exacerbated by the respondents militant tactics. As Dr. Rodriguez testified in Senate hearings this year as
to the health effects on women:

> Our patients are the ones who suffer. Women who do make it in have a heightened level of anxiety and a greater risk of complications. The delay caused by the invasions has forced some patients to seek care elsewhere due to the fact that their gestational age has gone beyond the first trimester. The risk to these women is unnecessarily increased. These assaults also interfere with the entire range of reproductive health services that we deliver, including contraception, general gynecology and treatment for STDs.

1993 Senate Hearings, Rodriguez Testimony at 6.

Similarly, in *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417 (W.D.N.Y. 1992), in which plaintiffs sought to enjoin "blockades" of clinics and so-called "rescues" of patients, the court noted:

uncontradicted testimony that the risks associated with an abortion increase if the patient suffers from additional stress and anxiety. Increased stress and anxiety can cause patients to: (1) have elevated blood pressure; (2) hyperventilate; (3) require sedation; or (4) require special counseling and attention before they are able to obtain health care. Patients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery.

Often times, patients are too upset to undergo the medical procedures scheduled for that day and must reschedule the procedure . . . This delay can increase the risks associated with an abortion. For example, the delay may move the pregnancy from the first trimester to the second trimester during which the risks associated with the procedure increase. Other women who are seeking a post-abortion check-up might delay their appointment or simply cancel it altogether, thereby enhancing the possibility of complications. For some women who elect to undergo an abortion, clinic medical personnel prescribe and insert a device known as a pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding and other potentially serious complications. If a woman returning to have the laminaria removed finds that her access to the clinic entrance is blocked or impeded . . ., the above-mentioned complications may result. 799 F. Supp. at 1427.[22]

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[22]*See also Planned Parenthood Association of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617, 620 (N.D. Cal. 1991) (women are often so upset by protestors that they reschedule appointments and obtain more later, and therefore more dangerous, medical procedures); *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1489 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part, vacated in part sub nom, Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) ("a 'rescue' (continued...)

In sum, without a federal means of restraining respondents and other antiabortion zealots who engage in criminal conduct, the violence against clinics and physicians who provide abortions will continue to take its toll on women's health.

III. RICO'S BROAD WORDING SQUARELY APPLIES TO ANY PERSON OR ENTITY THAT ENGAGES IN A "PATTERN OF RACKETEERING ACTIVITY," REGARDLESS OF ECONOMIC MOTIVATION.

A federal remedy against respondents' lawlessness is provided for by the terms of RICO, 18 U.S.C. § 1962(c), which forbids "any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . ." As described above, much of the criminal activity engaged in by anti-choice extremists constitutes a pattern of racketeering activity.

This Court has repeatedly held that "RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, . . . but also of its express admonition that RICO is to 'be liberally

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[22](...continued)
demonstration creates a substantial risk that a clinic's patients may suffer physical and mental harm"); *Cousins v. Terry*, 721 F. Supp. 426, 432 (N.D.N.Y. 1989) (testimony that women who gained entrance to the clinic were "traumatized by the ordeal" of having to be escorted through demonstrators shouting insulting epithets); *Roe v. Operation Rescue*, 710 F. Supp. 577, 582 (E.D. Pa. 1989) (woman denied necessary medical services in Pennsylvania as a result of blockade), *aff'd*, 919 F.2d 857 (3d Cir. 1990); *N.Y. State National Organization for Women v. Terry*, 704 F. Supp. 1247, 1260-61 n. 17, 1262 (S.D.N.Y.) (1989), *aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990).

construed to effectuate its remedial purposes.'"[23] *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985) (citations omitted); *see also Tafflin v. Levitt*, 110 S. Ct. 792, 799 (1990). "The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'"[24] *Id.*, 473 U.S. at 499 (quoting *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606(1985)). *See also Russello*, 464 U.S. at 26 (RICO was "intended to provide new weapons of unprecedented scope"). The breadth of RICO, and the fact that by its plain terms it applies to the respondents' conduct at issue here, is the result of deliberate policy choices on the part of Congress.[25] Accordingly, the Court should construe RICO to the full extent

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[23]Section 904(a) of RICO, Pub.L. No. 91-452, 84 Stat. 947, see note following 18 U.S.C. § 1961, p. 438, directs that "[t]he provision of this Title shall be liberally construed to effectuate its remedial purposes." In *Russello v. United States*, 464 U.S. 16, 27 (1983), this Court noted that RICO is the only substantive federal criminal statute that contains such a directive.

[24]Furthermore, this Court has observed that

> the language of the statute and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of [RICO]. Indeed, the very purpose . . . was to enable the Federal Government to address a large and seemingly neglected problem. The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions.

United States v. Turkette, 452 U.S. 576, 586 (1981). These words are as applicable to clinic violence as to other types of organized crime.

[25]Indeed, on several occasions amendments to RICO were proposed that would have excluded criminal conduct that was not economically motivated, but none of those amendments were enacted. *See e.g.*, Senate Report 101-269, 101st Cong., 2d Sess. (April 24, 1990) at 12.

of its carefully chosen terms in order to reach the respondents' concerted national campaign of violence and threats against women and physicians.

IV. A FEDERAL REMEDY IS NECESSARY TO ENSURE THAT WOMEN ARE NOT PREVENTED FROM EXERCISING THEIR RIGHT TO CHOOSE ABORTION.

Absent a federal remedy, clinic violence and intimidation of physicians and clinic staff are unlikely to abate.[26] Testimony before several federal district courts demonstrates that state criminal laws and local law enforcement officials cannot control organized widespread clinic violence and harassment. Additionally, abortion opponents have interpreted this Court's decision in *Bray* as permission to engage in criminal behavior, and the inevitable result has been increased violent and threatening activity, which is also designed to paralyze local law enforcement.[27]

For example, a Kansas district court found that "Operation Rescue has purposefully acted to interfere with the ability of the local law enforcement authorities to protect the rights of the plaintiffs and their patients." *Women's Health Care Services v. Operation Rescue*, 773 F. Supp. 258, 265 (D. Kan. 1991). In addition, the district court in *Pro-Choice Network*,

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[26]Prior to *Bray*, many reproductive health providers, frustrated by the lack of remedies in state court, obtained injunctions and other relief in the federal courts. *See, e.g., Mahoney v. District of Columbia*, No. 89-3136-OG, 1990 U.S. Dist. LEXIS 69 (Jan 8, 1990); *McMonagle*, 868 F.2d 1342; *Terry*, 886 F.2d 1339 (2d Cir. 1989). Since *Bray*, however, the only other federal avenue of relief now available of which we are aware is the one at issue in this case.

[27]Indeed, the organized efforts of respondents include harassment and intimidation of local law enforcement officials and witnesses who testify against them. *Pro-Choice Network*, 799 F. Supp. at 1426-27.

found that "[l]ocal law enforcement has been unable to respond effectively to plaintiffs' complaints . . . Defendants participate in their "rescue" activities on a continual basis and the local police do not have the resources necessary to monitor the situation constantly." 799 F. Supp. at 1426.[28]

Testimony before Congress confirms the inability of state laws and local officials to combat the respondents' organized and sweeping attacks on abortion services and on women who seek abortion. It also demonstrates that some local law enforcement agencies are dangerously lax in their response to the violence. Willa Craig, Executive Director of the Blue Mountain Clinic, testified:

> We have sought, when necessary, the protection of Montana law, with minimal result. In one Montana

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[28]See also *Bray*, 113 S. Ct. at 781, 796 (Stevens, J., dissenting) (during "rescue" operations, "the duly constituted authorities are rendered ineffective and *mob violence prevails*") (emphasis added); *Town of West Hartford v. Operation Rescue*, 991 F.2d 1039 (2d Cir. 1993) (demonstrators' unruly conduct required the intervention of approximately one-third of the town's police force); *National Organization for Women v. Operation Rescue*, 726 F. Supp. at 1489-90 & n.4 (limited police resources combined with lack of advance notice identifying a target clinic makes it difficult for local police to prevent protestors from forcing the closure of a facility); *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371, 379 (D. Conn. 1989), *vacated*, 915 F.2d 92 (2d Cir. 1990) (about one-third of the police force was stationed at the clinic, therefore, had an emergency occurred elsewhere, police could not have responded promptly); *NOW v. Operation Rescue*, 726 F. Supp. 300, 303 (D.D.C. 1989) (even if police knew in advance which clinics would be targeted, they do not have enough personnel and resources to prevent protracted interruption of access); *Terry*, 704 F. Supp. at 1262 (inability of local police officers to ensure access to targeted clinics in the face of blockades makes injunctive relief necessary); *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 406 Mass. 701, 550 N.E.2d 1361, 1363-64 (1990) (local police ineffective in preserving access to clinic).

> community local police refused to respond even to an office invasion. There is much evidence that this violent sector of the anti-choice movement is systematically organized and deployed, and that it's leaders are often known to the authorities. They advertise publicly for recruits and utilize the media to announce plans and reject warnings from city officials. They have been made bolder by the lack of substantive penalties and law enforcement resources in small towns. It is evident in Montana that the scope of this violence exceeds the ability of even a willing community to respond effectively.

1993 Senate Hearings, Craig Testimony at 4.[29]

It is thus quite clear that state laws and state law enforcement are inadequate to confront the nationally organized "mob violence"[30] that defines and characterizes respondents' conduct. This is precisely the type of circumstance -- where organized, interstate activity is impervious to local law enforcement -- that RICO was designed to address, and this Court should apply the law as broadly as it was both intended and written.

V. RICO REACHES ONLY CRIMINAL CONDUCT, NOT PROTECTED SPEECH.

Finally, it is clear that criminal conduct is not protected by the First Amendment and reversing the Seventh Circuit's

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[29] Mary Bannecker, Administrator of the Northeast Women's Center, testified, "[t]he police response in Philadelphia has . . . been inconsistent. On November 24, three people illegally entered the building . . ., and the police arrived and no arrests were made. Again, on November 30, seven people entered the clinic illegally. The police were called again and no arrests were made." 1985-86 Hearings at 6.

[30] *Bray*, 113 S. Ct. at 796 (Stevens, J., dissenting).

decision would not open the door to criminal prosecution of protected speech. Indeed, the Court of Appeals took care to note that petitioners' complaint is not based on constitutionally protected conduct, but rather "seeks relief from criminal and tortious activities such as trespass, clinic invasion, vandalism, extortion, and tortious interference with business relationships." 968 F.2d at 616.[31] Moreover, it is well-established that "[t]he First Amendment does not protect violence.[32]

Not only does respondents' conduct fall outside the scope of the First Amendment's protection, RICO, by its terms, focuses exclusively on conduct that is criminal. "Racketeering activity" is an essential element of a RICO offense, *see* 18 U.S.C. § 1962, thus any application of RICO to anti-choice protestors would address their conduct only insofar as it violates specified federal criminal laws, such as the arson and

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[31]In *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993), this Court carefully distinguished the Wisconsin ordinance at issue in that case, which was directed at "conduct unprotected by the First Amendment," *id.* at 2201, from the Minnesota ordinance at issue in *R.A.V. v. St. Paul*, 112 S. Ct. 2538, 2547 (1992), which was "explicitly directed at expression." *Mitchell*, 113 S. Ct. at 2201. So here, insofar as respondents' activities are criminal, the Court should recognize that they are not protected expression.

[32]"Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'" *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (quoting *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglas, J., concurring). As this Court very recently affirmed, "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment." *Mitchell*, 113 S. Ct. at 2199. *See also McMonagle*, 868 F.2d at 1349 (affirming liability under RICO of defendants who had entered clinic illegally because "[d]efendants' actions went beyond mere dissent and publication of their political views").

extortion engaged in by respondents here.[33]

In sum, so long as respondents obey the criminal laws they need not fear suit under RICO. But because respondents have dedicated themselves to lawlessness, this Court must permit the use of RICO to protect the lives and health of women who seek reproductive health care and the lives and health of clinic staff and physicians who seek to provide that care.

CONCLUSION

For the foregoing reasons, *amici curiae* urge that the judgment of the Court of Appeals be reversed.

Dated: August 13, 1993

Respectfully submitted,

Kathryn Kolbert*
Eve C. Gartner
Center for Reproductive
Law & Policy
120 Wall Street
New York, New York 10005
(212) 514-5534
Counsel for Amici Curiae
*Counsel of Record

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[33]Similarly, in *United States v. Rowlee*, 899 F.2d 1275 (2d Cir. 1990), *cert. denied*, 498 U.S. 828 (1990), members of a political group that promotes the evasion of income taxes, were charged with violating 26 U.S.C. § 7602(2), which prohibits the willful assistance in preparation of a false or fraudulent tax return. The Court of Appeals for the Second Circuit, rejecting a First Amendment defense to the criminal convictions, held "[i]f the defendants did not violate [the statute], the restrictions imposed by that statute did not violate their First Amendment rights. If they did violate [the statute], they were not protected by the First Amendment." 899 F.2d at 1280; *see also United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985), *cert. denied*, 476 U.S. 1120 (1986).

No. 92-780

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATIONS, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

v.

JOSEPH SCHEIDLER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE NATIONAL ABORTION FEDERATION AND PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ELAINE METLIN
Counsel of Record
NANCIE A. THOMAS
2101 L Street, N.W.
Washington, D.C. 20037
(202) 828-2263

CELESTE LACY DAVIS
EVE W. PAUL
ROGER K. EVANS
LEGAL ACTION FOR REPRODUCTIVE RIGHTS
Planned Parenthood Federation of America, Inc.
810 Seventh Avenue
New York, New York 10019
Attorneys for Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF *AMICI CURIAE*

The National Abortion Federation ("NAF") and Planned Parenthood Federation of America, Inc. ("PPFA") submit this brief in support of petitioners.[1] NAF, a not-for-profit professional association, was

[1] The parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of the Court.

founded in 1977 and is composed primarily of clinics and physicians' offices providing reproductive health services, including abortion. Currently, NAF members include more than 300 abortion providers [2] operating in 46 states, the District of Columbia, Puerto Rico and Canada. NAF's primary objective is to unite providers of abortion services into a professional community dedicated to quality care. NAF provides professional standards, guidelines, training and education to its members and serves as a clearinghouse for information and advice to abortion service professionals and the general public.

PPFA, a not-for-profit corporation organized in 1922, is the leading national voluntary health organization in the field of family planning. Currently, PPFA has 165 affiliates in 49 states operating approximately 920 family-planning clinics. Forty-seven PPFA affiliates are also members of NAF. PPFA affiliates offer a wide range of services relating to reproductive health, including abortion. Sixty-three PPFA affiliates, operating 102 clinics, offer abortion services as part of their program.[3] All PPFA affiliates that do not provide abortion services themselves offer counseling and referral for such services.

NAF members and PPFA affiliates are the targets of the nationwide conspiracy of antiabortion violence and intimidation described in this case, and have suffered millions of dollars in damage to their business and property resulting from the activities of respondents. In addition, NAF's headquarters in Washington, D.C. were firebombed by self-professed antiabortion activists on July 4, 1984. Thus, *amici* have a special concern that the Court be fully informed about the harmful economic effects of respondents' unlawful activities, as this conduct more than

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[2] Fifteen applications for membership in NAF are currently pending.

[3] An additional 18 PPFA affiliates expect to offer abortion services by the end of 1993.

fulfills the requirement of injury to business or property as set forth in 18 U.S.C. § 1964(c).

STATEMENT OF FACTS

Amici curiae refer to the Statement of Facts set forth in the Brief for Petitioners filed with this Court.

SUMMARY OF ARGUMENT

The sole economic requirement of the civil RICO statute requires plaintiffs to allege injury to business or property. There is no dispute that petitioners have satisfied this requirement. Petitioners have alleged that respondents' pattern of extortionate activity has inflicted enormous damage on the business and property of abortion providers throughout the nation.

Over the past decade, respondents have engaged in a campaign of terror with the self-proclaimed purpose of shutting down clinics and physicians' offices that provide abortion services. A factual overview of this campaign shows a nationwide pattern of vandalism, harassment, violence and intimidation that has caused physicians to cease performing abortions and has wreaked millions of dollars in damage. This brief illustrates the shocking and unlawful behavior of the militant anti-abortion wing in 13 case studies of abortion providers who have suffered enormously at the hands of anti-abortion extremists.

ARGUMENT

I. RICO IS A BROAD REMEDY THAT CAN AND SHOULD BE AVAILABLE TO COMBAT THE VIOLENT AND INTIMIDATING TACTICS OF MILITANT ANTIABORTION EXTREMIST GROUPS

Nearly seven years ago, petitioners filed suit to combat the campaign of violence, destruction and intimidation that militant antiabortion groups have inflicted on abortion providers, their staff and their families. Notwithstanding its finding that respondents engaged in "reprehensible" activities,[4] the United States Court of Appeals for the Seventh Circuit held that the case must be dismissed under Fed. R. Civ. P. 12(b)(6) in part because petitioners did not allege that the RICO conspiracy was economically motivated.

In engrafting the pleading requirement of economic motive onto RICO, the Seventh Circuit failed to follow both the explicit direction of Congress and the teachings of this Court regarding the breadth and scope of RICO. When it enacted RICO, Congress stated that it should be "liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970), note following 18 U.S.C. § 1961. Time and time again, this Court has followed this directive and has consistently refused invitations to narrow RICO's scope. For example, in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), the Second Circuit imposed two additional requirements on civil RICO plaintiffs in response to a perceived misuse of the statute: showing of a prior criminal conviction and a racketeering injury. *Id.* at 481. This Court reversed, explaining that "RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.'" *Id.* at 497-98 (citations omitted). *See also H.J. Inc. v.*

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[4] 968 F.2d at 621, 630.

Northwestern Bell Telephone Co., 492 U.S. 229, 235 (1989) (rejecting interpretation of "pattern of racketeering activity" as requiring proof of multiple schemes); *Russello v. United States*, 464 U.S. 16, 22 (1983) (rejecting argument that RICO forfeiture provision was limited to interests in an enterprise); *United States v. Turkette*, 452 U.S. 576, 587 (1981) (rejecting argument that RICO enterprise requirement be limited to legitimate enterprises only).

Nothing in the text of 18 U.S.C. § 1962(c) supports the pleading requirement added by the Seventh Circuit.[5] Instead, in pleading a violation of criminal RICO, the statute requires only that a RICO enterprise be engaged in or that its activities affect interstate or foreign commerce. *See* 18 U.S.C. § 1962(a), (b), (c). Under civil RICO, 18 U.S.C. § 1964(c), the plaintiff must also plead and prove that defendants' unlawful conduct injured her business or property. Petitioners have undisputedly satisfied these requirements.

II. ABORTION PROVIDERS HAVE SUFFERED VAST INJURY TO THEIR BUSINESS AND PROPERTY DUE TO RESPONDENTS' ACTIVITIES

Both NAF and PPFA include large numbers of providers throughout the nation who have been subject to the same sort of attacks, and indeed, in many cases, the very attacks, described in petitioners' Second Amended Complaint and RICO case statement.[6] Both organizations

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[5] Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

[6] Although the District Court refused to certify the proposed class, the class in this case would properly include petitioner clinics and "all other similarly situated clinics performing abortions that

collect information from their members. NAF publishes its data in *Incidents Of Violence & Disruption Against Abortion Providers* and *Summary Of Extreme Violence Against Abortion Providers.*[7] The factual overview and individual case studies that follow more than justify the application of RICO to the extreme elements of the anti-abortion movement.

NAF received reports of 1,380 acts of violence against abortion providers,[8] 287 bomb threats and 581 clinic blockades between 1977 and July 21, 1993. Since the 1980's, these activities have intensified in severity and frequency. The 1990's have seen a dramatic increase in violence and terrorism. During the period from 1991 to mid-1993, 31 clinics providing abortion services were the targets of arson and 220 such clinics were vandalized.

In 1993, antiabortion extremists have relentlessly heightened the levels of violence and the accompanying damage, including threatening, stalking and even murdering[9] abortion providers in their campaign to coerce abortion providers to stop providing abortion services. In the first seven months of 1993 alone, antiabortion proponents made death threats to 56 abortion providers and stalked another 119. Some physicians have ceased to perform abortions and some clinic staff members have quit their

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[respondents] seek to drive out of business through a pattern of concerted unlawful activity." Thus, this class would include many members of NAF and PPFA.

[7] Copies of the current versions of these publications are being lodged with the Clerk of the Court.

[8] Acts of violence include murder, bombing, arson, attempted bombing and arson, invasion, vandalism, assault and battery, death threats, kidnapping, burglary and stalking. (Stalking is defined as the persistent following, threatening and harassing of an abortion provider, staff member or patient *away from* the clinic. NAF began tabulating stalking incidents in 1993.)

[9] In March 1993, Dr. David Gunn, a doctor at Pensacola Medical Services in Pensacola, Florida, died after an antiabortion extremist shot him three times in the back.

jobs out of fear for their safety and the safety of their homes and families due to the heightened violence.

Between January 1 and May 31, 1993, arson and vandalism caused an estimated $2,058,553 worth of property damage alone.[10] This figure does not include business revenue lost by clinics forced to suspend operations to repair damage, replace medical equipment or locate and move to replacement space, nor does it include the increased insurance costs suffered by these clinics [11] (and, in some instances, the clinics' landlords), the loss of income to clinic employees who have lost their jobs, legal fees and increased security costs to protect clinics from damage and their staff from intimidation.

These activities have had a profound impact on the livelihoods of abortion providers, their staff and their families. *Amici* have gathered a representative sampling of these episodes to demonstrate the far-reaching economic effects of respondents' violent and disruptive conduct.

A. Physicians

The following section describes four physicians who are victims of extortionate behavior typical of the pattern of racketeering activity alleged by petitioners. These case studies show that militant groups have driven or attempted to drive physicians out of business with the classic techniques of extortion: force, threats of force, fear and violence. Based on these tactics, which have been employed against physicians and members of their families, abortion providers have been deprived of "the right to make [their] business decisions free of threats and coer-

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[10] Between February and May 1993, antiabortion extremists burned five clinics and vandalized at least twelve with butyric acid.

[11] Due to the ongoing, publicized terrorist tactics of the antiabortion forces, many insurance companies consider clinics to be bad risks and therefore regularly refuse to insure them for the full value of their property and business.

cion." *United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987); *see Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir.) (abortion clinic's intangible right to continue to operate its business sufficient to satisfy property right element of Hobbs Act, 18 U.S.C. § 1951, and RICO, 18 U.S.C. § 1961(1)(B)), *cert. denied*, 493 U.S. 901 (1989). As these case studies show, some physicians have succumbed to the pressure and have ceased to perform abortions.

1. *Dr. Susan Wicklund—Fargo, North Dakota; Bozeman, Montana*

Dr. Susan Wicklund, who began performing abortions in 1988, traverses the upper northern regions of this country in order to provide abortion services to her patients. In 1989, she began practicing at the Fargo Women's Health Organization (the "Fargo Clinic")—the only clinic in all of North Dakota that includes first trimester abortions among the wide range of reproductive health care services it offers. Dr. Wicklund alternates with another physician weekly in performing abortions on the two days that the clinic sets aside for the procedures. On other days, she provides gynecological services, including abortions, to clients of the Mountain Country Women's Clinic in Bozeman, Montana.

The price of continuing such a practice, in the face of an ever-increasing shortage of physicians willing to provide abortion services, is high. The tactics of the anti-abortion terrorists have forced Dr. Wicklund to purchase a .38 caliber revolver and a bullet-proof vest. She is escorted in and out of clinics by a personal security guard. She is the frequent target of death threats and stalking.

Moreover, in the summer of 1992, when Dr. Wicklund was performing abortions at the Summit Women's Health Organization in Milwaukee, Wisconsin, she was violently

attacked. As members of the antiabortion organization Missionaries to the Preborn demonstrated outside the clinic, Dr. Wicklund attempted to enter through the back door. She was grabbed by a protester, thrown against a van and told, "we're going to stop you—no matter what." Despite her struggle, Dr. Wicklund was unable to escape from her captor and clinic personnel rushed to her aid. Before they could gain her release, however, a virtual tug of war ensued between the protesters and the staff, with Dr. Wicklund as the pivot point. Dr. Wicklund worked that day and those immediately following with multiple bruises.

In Fargo, members of the Lambs of Christ have so heightened the level of intimidation and harassment against Dr. Wicklund as to warrant an injunction against their alleged criminal and tortious acts. *Fargo Women's Health Organization, Inc. v. Lambs of Christ,* 488 N.W.2d 401 (N.D. 1992). Even though the injunction requires the protesters to remain at least 100 feet from the clinic, Dr. Wicklund never feels safe in Fargo and she never stays overnight. For a three-month period, she received phone calls and letters daily advising her of her imminent death. Dr. Wicklund has no doubt that certain members of the antiabortion movement are conspiring to stalk and frighten her: for the duration of a year, a group of extremists would harass her when she boarded a plane to travel to Fargo, or elsewhere. When her plane would land in another state, 250 miles away, a different group of screaming protesters would greet her at the gate. These activities occurred even if she took odd flights in order to confuse her pursuers. Currently, she is trailed in her car by persons who communicate by walkie-talkies. Although one antiabortion activist has been charged and convicted for stalking her in Fargo, that case is on appeal and Dr. Wicklund still worries for her life.

In January 1993, Dr. Wicklund bought the gynecological practice of Dr. Francis Balice in Bozeman, Montana.

He, too, had been threatened frequently by antiabortion zealots who claimed they would kill him and put him out of business. However, Dr. Balice, who was nearing retirement, was determined to continue his practice for at least another three years rather than cave in to the harassment and intimidation tactics of the militants. When Dr. Wicklund offered to buy the clinic, Dr. Balice was pleased to turn over his business to her. Nevertheless, the threats against the clinic did not stop with the arrival of a new physician.

Dr. Wicklund receives letters daily, sometimes twice a day, at the Mountain Country Women's Clinic threatening either to burn down the clinic or to take her life. In her second week of operation, she received a letter from a Missouri antiabortion activist who wrote "my mission is to shut you down and to make sure you will never do abortions." After the murder of Dr. Gunn in Pensacola, Florida, the tone of the letters became even more graphic and threatening. At least one letter, dated March 11, 1993, threatened to tear her limb from limb just like the "babies" she was "murdering": "How would you like to have your legs ripped off one by one? How about your arms, one by one? How would you like to have your skull crushed? It should happen to *you.*"

Dr. Wicklund's home has been burglarized twice since she began the Bozeman practice. The perpetrators did not take anything either time and Dr. Wicklund believes they intended to highlight her vulnerability, even in her residence. While she lives with the constant fear that her life will be taken or her family harmed, Dr. Wicklund vows to continue providing safe and legal abortions to women who seek them.

2. *Dr. Abraham Anderson—Norfolk, Virginia*

Dr. Abraham Anderson is an OB/GYN who has practiced in Norfolk, Virginia since 1971. He practices out

of three offices, one in Norfolk and two in Chesapeake. Abortions comprised less than two percent (2%) of Dr. Anderson's practice. Dr. Anderson was the only physician in the Norfolk area who performed abortions for Medicaid patients at a reduced fee, or for no fee whatsoever.

After frequent episodes of residential picketing, Dr. Anderson began to receive letters threatening to post "Wanted" posters bearing his picture around his neighborhood and near his office unless he signed an agreement that he would no longer perform abortions. One such letter threatened to "make it impossible for [him] to practice."

Following months of harassment, Dr. Anderson sued Donald Spitz and the local Operation Rescue organization. Approximately two weeks after obtaining a restraining order, Dr. Anderson began to receive threatening cards and letters from other states, including Texas, and from countries in Europe, many of which contained similar or identical handwriting, indicating that the same person or persons were writing the cards and letters, and either mailing the letters themselves or recruiting other people to mail them from other locations. Additionally, local antiabortion forces began to place "Wanted" posters on telephone poles on the street leading to Dr. Anderson's office. The propaganda posted and issued by the antiabortion forces misrepresented Dr. Anderson as only performing abortions, when in reality abortions comprised a very small part of his practice.

The harassment of Dr. Anderson increased dramatically in the past year. On three occasions, at two-week intervals, antiabortion activists littered his driveway with nails at night. On another occasion, they broke down a side gate leading to his yard and pushed in the storm windows at the back of his house. Additionally, another militant and an accomplice began to stalk Dr. Anderson. In response to these events, local police forces increased surveillance around Dr. Anderson's house. This increased surveillance failed, however, to deter Dr. Anderson's harassers.

Dr. Anderson is the father of a fourteen-year-old daughter who, due to his work schedule, is often home alone at night. Dr. Anderson became increasingly frightened by the harassment and intimidation, especially because he felt that the local Operation Rescue organization was actively recruiting unstable people who might go so far as to kill him. Fearing for his own safety and that of his daughter, Dr. Anderson decided to cease performing abortions.

3. *Dr. Clay Alexander—Dallas, Texas*

Dr. Clay Alexander began performing abortions as part of his private gynecological practice in Dallas, Texas in 1987. Beginning in June 1992, members of the Dallas Pro-Life Action Network ("Dallas PLAN") targeted Dr. Alexander for a harassment campaign. After seven weeks of concentrated harassment and intimidation, Dr. Alexander considered the toll taken on his wife and children and reluctantly signed a "no-abortions" pledge.

In order to obtain Dr. Alexander's surrender, Dallas PLAN established daily pickets outside his office, the hospital with which he is affiliated and his home,[12] and began telephoning him at all hours of the day and night, demanding that he stop performing abortions. Letters and postcards angrily calling for his retirement from abortion practice filled his mailbox each day. Dallas PLAN members would pepper his residential block with pamphlets depicting mutilated third trimester fetuses. On one occasion, the extremists littered his lawn with white crosses to simulate a cemetery. Dallas PLAN members also stalked Dr. Alexander's wife on her daily errands, following her into each business, from the dry cleaner to the video store, and demanding of the proprietor, "don't serve the wife of a baby killer!"

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[12] *See* Steve Blow, *Abortion Foes Moving Down List of Doctors*, Dallas Morning News, Oct. 9, 1992, at 31A.

In the middle of July 1992, Dr. Alexander phoned Tom Cyr, the director of Dallas PLAN, and asked what he must do to make the harassment stop. Cyr informed him that his life would return to normal if he signed a pledge promising never again to perform abortions. In addition, Cyr instructed Dr. Alexander to turn over a passport-quality photo of himself which could be disseminated to Dallas PLAN members. In this way, explained Cyr, the group could be certain of Dr. Alexander's identity and "if we ever see you anywhere near an abortion clinic, we'll start up all over again. We'll hound you to the ends of the earth and make your life a living hell."

Since Dr. Alexander signed the pledge, Dallas PLAN has publicized his case and has targeted other doctors in the area, with some success.[13] Dr. Alexander is distressed when he informs a woman that although an abortion is a medical necessity, he is constrained from performing the procedure. He states that he would never have signed the pledge if he were a single man; however, as a husband and father of one- and three-year-old children, Dr. Alexander is afraid of exposing his family to increasingly violent harassment.

4. *Dr. Smith* [14]

Dr. Smith has been an OB/GYN in California for 22 years. He is a solo practitioner who, from 1979 to 1992, performed abortions as part of his OB/GYN practice. The provision of abortion services constituted only one to five percent (1-5%) of Dr. Smith's practice. In 1992, however, in order to save his family from further harassment by antiabortion forces, Dr. Smith reluctantly signed a pledge that "[he] will not perform abortions anymore."

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[13] *See id.*

[14] At the request of the physician, his name has been changed to protect him from retaliation from antiabortion groups.

The events leading up to Dr. Smith's signing of the pledge included an invasion of his office by more than 100 demonstrators who vowed to destroy him. Anti-abortion extremists also harassed his family and threatened to deliver pamphlets labeling him a "baby killer" to the elementary school attended by his eight-year-old son. When Dr. Smith's wife could no longer tolerate the strain and pressure of this harassment, she threatened to leave him if he did not accede to the harassers' demands.

Dr. Smith sought help from the local sheriff, who invited Dr. Smith to bring his complaint to the sheriff's office. When Dr. Smith arrived, however, he found one of his harassers in the sheriff's office. The sheriff proposed to "mediate" the conflict between Dr. Smith and the anti-abortion forces. Under pressure, Dr. Smith, realizing that he would receive no assistance from the local law enforcement, reluctantly signed the pledge and delivered it to the harasser in the sheriff's office. Although anti-abortion demonstrators no longer threaten Dr. Smith, they monitor his office to check whether he is keeping his pledge.

B. Arson

1. *The Pacific Northwest*

Between February and May 1993, antiabortion zealots burned three clinics located in the northwest United States. Each of these arsons followed a similar pattern: late at night, typically between 2:00 and 4:00 a.m., the arsonists sprayed the clinic with gasoline (or a similar flammable substance) and set fire to the building. Due to different structural characteristics of the buildings which housed these clinics, however, they did not suffer equivalent amounts of damage.

a. *Blue Mountain Clinic—Missoula, Montana*

The Blue Mountain Clinic ("Blue Mountain"), which opened in Missoula, Montana in 1977, was the first clinic

in Montana to perform abortions. Abortion services, however, comprised less than twenty percent (20%) of its business. The majority of Blue Mountain's business derived from other health care services, including prenatal and pediatric care. Blue Mountain was one of only three facilities in the region to provide prenatal care to Medicaid patients. Additionally, Blue Mountain had an exclusive Department of Health contract to perform childhood immunizations. Blue Mountain's clientele came from a 300-mile radius which encompassed western Montana, northern Idaho, eastern Washington and parts of western Canada. Blue Mountain's regular clients (*i.e.*, patients seen on a regular basis for health care other than abortion services) numbered more than 5,000 in 1992.

Blue Mountain had been subjected to ongoing harassment by antiabortion activists over a period of several years, including two "rescues" by Operation Rescue in the past three years and death threats made to Blue Mountain's former director.[15] On March 29, 1993, antiabortion arsonists saturated the roof and eaves of Blue Mountain with a flammable accelerant and threw an incendiary device inside the building. The fire alarm went off at approximately 3:56 a.m. Although firefighters and police arrived on the scene within three minutes, Blue Mountain was completely destroyed. The police have not apprehended the arsonists and do not even have a suspect.

The arson of Blue Mountain caused at least $250,000 in property damage alone, not including the cost of the building which Blue Mountain leased from the owner of the complex.[16] Blue Mountain has also lost approxi-

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[15] A previous director of Blue Mountain and an OB/GYN in Bozeman, Montana both received death threats from the same identified antiabortion zealot.

[16] Another building in the complex suffered extensive smoke damage that forced the tenant to move. Thus, the arson of Blue Moun-

mately $50,000 per month in revenue since the arson. Blue Mountain's insurance covered only a portion of these losses—its business loss insurance covered only the first two months following the arson, and its property insurance covered less than half of the property loss.

The economic effects of the destruction of Blue Mountain reach beyond property and revenue loss. Montana is a rural area hard hit by the recession. Blue Mountain formerly employed 38 people, but since the arson it maintains a skeletal staff of eight. If Blue Mountain cannot raise the money to rebuild, these eight people will also lose their jobs.

Blue Mountain has not performed an abortion since the arson and, other than quietly leasing a small amount of space from a local physician to provide some health care services for less than half of its regular patients, has been unable to reopen.

b. *Women's Health Care—Boise, Idaho*

Women's Health Care ("Health Care"), which opened in Boise, Idaho in 1981, was primarily established to allow nurse practitioners to provide contraceptive and general gynecological care. Health Care initially did not perform abortions, but added the service in late 1981-early 1982 due to patient demand. Health Care's patients are mostly women, but it also provides general health care to some men and children. Health Care serves approximately 500 patients per month, 30-35 of whom seek abortion services.

On May 28, 1993, at approximately 3:00 a.m., unidentified antiabortion activists broke a window in Health

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tain inflicted business and property damage not only on the clinic, but also on the owner of the business complex, who suffered the loss of two tenants, one destroyed building and one damaged building, and another tenant who incurred property damage and moving costs.

Care, doused the waiting room, ramp and roof with gasoline and set the building on fire. Health Care's waiting room, as well as most of its records, were destroyed in the fire. The failure of Health Care's stucco roof to ignite, however, saved the building from total destruction. Health Care estimates the damage at more than $100,000. The police found a gasoline can at the scene, but otherwise have no evidence and no leads.

Approximately one week later, Health Care located a smaller, temporary space, but the lease for this space expires at the end of August 1993 and renewal is uncertain. Health Care has suffered a forty percent (40%) drop in its business since the arson, in large part because it does not have the facilities to serve more patients, and currently provides health care services only to those who require immediate care. Given the increased visibility of its current space, Health Care fears that greater numbers of protesters and intensified harassment will frighten other patients away.

c. *Bours Health Center—Forest Grove, Oregon*

Dr. Peter Bours began his family practice in 1975. In 1979, he constructed the building which houses the Bours Health Center in Forest Grove, Oregon (the "Center"). In recent years, Dr. Bours has begun concentrating primarily on family planning. He provides abortion services for approximately 200 patients per year.

At 2:15 a.m. on May 13, 1993, the fire alarm at the Center sounded. Much like the arsons at Blue Mountain and Health Care, arsonists sprayed the roof and eaves of the Center with gasoline and ignited the building. The Center suffered approximately $5,000 in property damage. Were it not for the prompt response of the fire department and certain structural characteristics of the building, including a lack of attic space between the roof and the ceiling, the Center would have suffered much greater damage. The police have no suspects.

2. *Reproductive Services/Adoption Affiliates—Corpus Christi, Texas*

Reproductive Services/Adoption Affiliates ("Services/Affiliates") are affiliated not-for-profit organizations. Services owns and operates several non-profit family-planning clinics in the southwest United States that provide educational programs to schools and community groups on birth control and other sexuality issues, and also provide a range of family-planning and gynecological services, including abortion. Affiliates is an associate organization that provides adoption services to women, including medical treatment and both pre- and post-adoption counseling. In each of their clinics, Services/Affiliates share office space and personnel.

The Services/Affiliates clinic in Corpus Christi, Texas (the "Corpus Clinic") opened in 1978. The former building of the Corpus Clinic housed both a medical, family-planning clinic and an adoption services center. The sign on the building carried the names of both organizations. The Corpus Clinic serves approximately 35-40 patients a week, approximately 20-25 of whom seek abortion services or information on abortion services. It also provides medical treatment and counseling to many birth mothers. The Corpus Clinic's clients range widely in age and come from a broad base of circumstances.

Until February 1993, the Corpus Clinic was housed in a freestanding building located in a multi-business complex. In the early morning of February 15, 1993, arsonists axed or kicked in the front door of the Corpus Clinic and threw an incendiary device into the building, which set the Corpus Clinic on fire. The building was completely destroyed at a loss of more than $1,000,000.[17] The Corpus Christi police never apprehended the arsonists. The

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[17] *See* Lisa Richwine, *Women's Group Offers $20,000 Reward for Bombing of Texas Clinic*, States News Service, Mar. 5, 1993 ("States News").

Corpus Clinic was closed for over two months, but reopened in late spring at another location.

C. Other Vandalism, Property Damage And Economic Injury

1. *Planned Parenthood of San Diego and Riverside Counties—California* [18]

On March 9 and in the early morning hours of March 10, 1993, antiabortion vandals sprayed six abortion clinics in San Diego and Riverside Counties with butyric acid.[19] The most extensive damage by far occurred at the Planned Parenthood Clinic in Riverside (the "Riverside Center").

The Riverside Center, which had been the subject of an arson attack in 1988, had just been renovated when the acid vandals hit. They apparently drilled a ⅛″ hole, about the size of a straw, in a window sash and pumped the acid in with a syringe.

A cleaning woman at the clinic discovered the damage first. When she entered the building, a noxious odor that smelled like a combination of manure and vomit overwhelmed her. Her skin felt hot, as if it were burning, and she could not breathe easily. Nauseated and unable to remain in the building, the employee sought treatment at an urgent care clinic. Her face and eyes burned for a long time afterward as if she had been badly sunburned.[20]

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[18] Planned Parenthood of San Diego and Riverside Counties ("Planned Parenthood of San Diego") operates twelve clinics, eleven of which are family-planning clinics and one of which provides prenatal services.

[19] All of these attacks closely preceded Dr. Gunn's murder in Pensacola, Florida on March 10, 1993.

[20] This was not the only medical consequence of the acid attack. One staffer who had been nursing her baby and had planned to continue for another six months was forced to stop after being exposed to the fumes. The local poison control center could not advise her as to the safety of her breast milk and her infant vomited after each nursing. Other staffers state that they reeked with

When the rest of the staff arrived within the hour, the noxious odor forced them to cover their mouths and close their eyes while they opened all the windows and doors. The smell did not dissipate with the influx of fresh air and, indeed, could be detected within a three-block radius of the Riverside Center. Recognizing that they could not deliver health care services in such an environment, the staff brought the telephones out through the windows, grabbed charts from files and rescheduled the day's appointments. For the walk-in clients who could not be forewarned, the staff dispensed birth control supplies and provided the most basic of services from the patio.

For the next two days, several contractors tried without success to rid the building of the odor. By March 12, two days after the attack, the staff concluded that their workplace was uninhabitable and decided to relocate. The relocation lasted five weeks, until an effective neutralizer could be found. Even then, the Riverside Center could not salvage the furniture.

The Riverside Center is once again in full operation. However, the cost of recovery has exceeded $90,000. The Riverside Center spent $35,000 in cleaning, replacing the carpet, hiring a security guard and relocating. It also lost $30,500 in income, invested $12,500 in a newly-installed perimeter security system, allotted $8,000 for security at Planned Parenthood of San Diego's administration building and two other clinics and has committed an additional $6,000 toward apprehending the vandals.

2. *The Women's Pavilion—South Bend, Indiana*

The Women's Pavilion (the "Pavilion"), a family-planning clinic located in South Bend, Indiana that provides a broad spectrum of OB/GYN services including abortion, opened in 1978. The Pavilion provides abortion services

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the odor of butyric acid when they returned home from the clinic. They found it necessary to discard their clothes in garages and patios before entering their homes and immediately to shower and wash their hair.

to approximately 20-30 patients per week. Due to its location in an area with three colleges, the Pavilion sees predominantly college-age, middle-class women, but draws patients from all walks of life.

In early May 1993, Peter Heers from Collegians Activated to Liberate Life ("CALL") contacted a local radio station, WVPE, to announce that CALL would be outside the Pavilion on the Friday before Mother's Day [21] distributing white carnations to "mothers" who had aborted their pregnancies. On May 7, 1993, approximately 25-30 protesters from CALL, primarily men, gathered in the parking lot of the Pavilion, harassed patients and staff and handed white carnations to patients entering and leaving the Pavilion.

Sometime on the night of Saturday, May 8, 1993, or early morning of Sunday, May 9, 1993 (Mother's Day), antiabortion vandals axed through a boarded-up mail slot on the front door of the Pavilion and air-compressed a powder form of butyric acid or a substantially similar substance [22] into the Pavilion. The vandals ran a hose from a spigot on the front of the Pavilion through the hole in the door and flooded the Pavilion.[23] Additionally, they drilled a hole in the back door and forced more butyric acid into the back rooms of the Pavilion, most likely by using syringes. There is no spigot at the back of the Pavilion and, therefore, they were unable to flood the Pavilion through the back door as well. Although the perpetrators have yet to be identified, they left a partially-full butyric acid bottle and several white carnations on the front steps of the Pavilion.

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[21] The Pavilion is not open on Saturdays.

[22] The Pavilion has yet to receive official confirmation that the substance used was butyric acid.

[23] *See Abortion Clinic Seeks Federal Investigation Following Acid Attack*, UPI, May 10, 1993, *available in* LEXIS, Nexis Library, Wires File.

An escort from the National Organization for Women who was patrolling the area around the Pavilion noticed the hose running in the front door on Sunday, May 9, and called the police. Because neither the police nor the fire department in South Bend possesses the technology to identify the exact chemicals used to vandalize the Pavilion, they sent the bottle left on the front steps and other samples to the FBI Crime Lab.

The Pavilion was closed for approximately six weeks to repair the damage and to air out the rooms, at a loss of approximately $45,000-60,000 in revenue. The damage has run into hundreds of thousands of dollars. The administrators were forced to replace the carpets, baseboards and internal doors, as well as most of the wallpaper. They also replaced the front and back doors, which the vandals damaged in the break-in, and repainted the ceilings. The Pavilion's insurance company has reimbursed the Pavilion for some of the damage, but recently has balked at paying further, questioning whether the Pavilion is a "legitimate business" and using other delay tactics.

3. *Reproductive Services/Adoption Affiliates—San Antonio, Texas*

The Services/Affiliates clinic in San Antonio, Texas (the "San Antonio Clinic"), a non-profit medical, family-planning and counseling clinic, opened on March 6, 1973. It was the first non-profit clinic to provide abortion services in the southwest United States (which has made it a particular target of the antiabortion forces in that region). Slightly larger than the Corpus Clinic, the San Antonio Clinic serves approximately 45 patients per week, approximately 25-29 of whom seek abortion services.

Late on the night of January 24, 1993, two days after President Clinton signed and issued the "Memorandum on Fetal Tissue Transplantation Research" and the "Memorandum on the Title X 'Gag Rule,' " unidentified antiabortion vandals drilled 27 holes in the roof and poured butyric acid into the San Antonio Clinic. The butyric

acid rendered the San Antonio Clinic uninhabitable for at least four days, made many employees ill [24] and caused thousands of dollars worth of damage. In addition to damaging the interior of the San Antonio Clinic, butyric acid also seeped into the insulation of the building, which had to be torn out and replaced. The police have not caught the vandals.

4. *Florida Women's Medical Clinic—Oakland Park, Florida*

The Florida Women's Medical Clinic in Oakland Park, Florida (the "Florida Clinic") has been housed in a multi-tenant office building since 1976. The Florida Clinic serves a range of patients, from middle-income women to Haitian and other refugees. It also provides prenatal and other services for the Department of Health. The Florida Clinic has tried to set its fees as low as possible because it is the only option for many lower-income women.

Over the past four years, beginning in 1989, anti-abortion activists shot out five plate-glass windows at the Florida Clinic, dumped motor oil on the front doors, strewed nails in the parking lot and super-glued the locks, causing an estimated $7,000 worth of property damage. Two physicians quit working at the Florida Clinic due to the harassment.[25]

The Florida Clinic's lease expires at the end of August 1993. The landlord has decided not to renew the lease because, due to the harassment and damage, he cannot attract other tenants to the building and is losing money. The clinic's move to its new site will cost $26,000.

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[24] *See* States News, *supra* note 17.

[25] One physician ceased performing abortions altogether; the other is now working at a clinic which has not been harassed.

5. *Clinic "X"* [26]

Clinic X, which provides OB/GYN services, including abortion services, to a primarily inner-city, indigent clientele that comes from a several-hundred-mile radius, opened in 1983. Approximately fifty to sixty percent (50-60%) of Clinic X's patients are Medicaid patients. Clinic X is located in a region with the highest rate of teenage pregnancy in the state.

During a two-week period in 1992, Operation Rescue targeted Clinic X and the other clinics in the city with massive blockades, invasions and increased harassment of staff and patients. Although Clinic X regularly sees approximately 100 patients per week, during this period Clinic X saw only 19 patients the first week and 35 patients the second week. Many patients who canceled or rescheduled appointments explained that they were afraid of the blockaders. This drop of sixty-five to eighty percent (65-80%) cost Clinic X more than $38,000 in lost revenues.[27]

One staff member of Clinic X quit just prior to the commencement of the two-week period because she feared harassment. Two other staff members did not come to work during those two weeks, citing fear for their personal safety if they attempted to enter the clinic.

CONCLUSION

The foregoing case studies, while not an exhaustive review, illustrate the illegal activities of a radical fringe of the antiabortion movement. This fringe is, in fact, a well-funded enterprise that is national in scope. The enterprise is both violent and intimidating; it regularly conspires to engage in acts of extortion, arson, vandalism

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[26] The name and location of Clinic X have been kept confidential at the request of the clinic administrator.

[27] This figure does not include legal fees.

and assault and it regularly succeeds in its aims. There is no question that the enterprise seeks to harm, and does harm, abortion providers in their business and property. Indeed, it has defined and declared its intent to "interfere with and even stop the business of abortion." Joseph Scheidler, *Closed: 99 Ways to Stop Abortion* 18 (1985). Having established a systematic method of attacking abortion clinics, the enterprise is now also targeting the abortion-providing physician or, in the words of Operation Rescue's Randall Terry: "the weak link." *See* Sandra G. Boodman, *Abortion Foes Strike At Doctors' Home Lives; Illegal Intimidation or Protected Protest?*, Wash. Post, Apr. 8, 1993, at A1.

The enterprise has no respect for the law. *See, e.g., Northeast Women's Center, Inc. v. McMonagle*, 745 F. Supp. 1082, 1094 (E.D. Pa.), *modified*, 749 F. Supp. 695 (E.D. Pa. 1990). Its flagrant disregard of court orders has resulted in numerous findings of contempt for Operation Rescue participants. *See, e.g., Roe v. Operation Rescue*, 919 F.2d 857 (3d Cir. 1990); *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); *NOW v. Operation Rescue*, 747 F. Supp. 772 (D.D.C. 1990). It threatens to spin completely out of control if tighter reins are not applied. Accordingly, *amici* urge this Court to find that the "reprehensible activities" of the enterprise are completely within the ambit of civil RICO and that economic motive has no place in the proper statutory construction of RICO.

For the foregoing reasons, this Court should reverse the decision below of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ELAINE METLIN
Counsel of Record
NANCIE A. THOMAS
2101 L Street, N.W.
Washington, D.C. 20037
(202) 828-2263

CELESTE LACY DAVIS
EVE W. PAUL
ROGER K. EVANS
LEGAL ACTION FOR
REPRODUCTIVE RIGHTS
Planned Parenthood Federation
of America, Inc.
810 Seventh Avenue
New York, New York 10019
Attorneys for Amici Curiae

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Petitioners,

—v.—

JOSEPH M. SCHEIDLER, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF NEITHER PARTY

Louis M. Bograd
(Counsel of Record)
American Civil Liberties Union Foundation
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-1681

Steven R. Shapiro
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*.

In its broadest sense, this case involves several issues of deep concern to the ACLU. A wave of violence and unlawful activity directed at abortion providers around the country has seriously impaired the ability of women to exercise their constitutional right to reproductive choice. That right is one that the ACLU has supported for decades, in the courts and elsewhere. The ACLU has participated in nearly every abortion case decided by this Court since *Roe v. Wade*, 410 U.S. 113 (1973), and lawyers associated with the ACLU have been counsel of record in many of this Court's landmark abortion decisions, from *Doe v. Bolton*, 410 U.S. 179 (1973), to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. __, 112 S.Ct. 2791 (1992). In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. __, 113 S.Ct. 753 (1993), the ACLU urged the Court to adopt an interpretation of 42 U.S.C. §1985 that would protect the right to reproductive choice against private conspiracies. Following the rejection of that argument in *Bray* and the subsequent assassination of Dr. David Gunn in Pensacola, Florida, the ACLU has supported efforts in Congress to enact a new civil rights law designed to curb the epidemic of clinic violence.

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[1] A letter of consent to the filing of all *amicus* briefs has been lodged with the Clerk of the Court by counsel for all parties in compliance with Rule 37.3.

In contrast to *Bray*, the present case has not been brought under a traditional civil rights statute but under RICO, 18 U.S.C. §1961, *et seq*. The reliance on RICO raises separate concerns for the ACLU, which opposed the enactment of RICO in 1970 and has opposed its overzealous enforcement ever since. Many of the ACLU's objections have focused on such due process issues as RICO's broad reach, its loose evidentiary standards, and its draconian forfeiture provisions. But the ACLU has also recognized that the problematic features of RICO carry a special sting in a First Amendment context. For example, in *Alexander v. United States*, __ U.S. __, 61 U.S.L.W. 4796 (June 28, 1993), the ACLU took the position that the use of RICO to seize and destroy the entire contents of a bookstore was irreconcilable with the First Amendment, a view shared in that case by the four dissenting justices. *Id*. at 4800.

Since its founding in 1920, moreover, the ACLU has steadfastly endorsed the position that the "[e]ffective advocacy of both public and private views, particularly controversial ones, is undeniably enhanced by group association," *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), and that the associational rights protected by the First Amendment include the right to demonstrate, boycott, leaflet and picket. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88 (1940). Because of the ACLU's commitment to the First Amendment, it has frequently defended the associational rights of political groups whose ideological views it has vigorously opposed.

In opposing *certiorari*, defendants have argued in this case that the economic motive test embraced by the Seventh Circuit is an appropriate means of ensuring that RICO is not used to abridge their First Amendment rights. In our view, the civil liberties interests at stake are far more complex. The ACLU has never endorsed the view, and this Court has never held, that there is a civil liberties interest in shielding political associations

from liability for their illegal acts. Thus, if plaintiffs are able to prove that defendants engaged in a pattern of illegal behavior designed to interfere with the exercise of plaintiffs' constitutional rights, the fact that defendants were motivated by politics rather than money is no more relevant than it would be if a group of white supremacists claimed a First Amendment right to intimidate blacks seeking to vote. As a matter of constitutional law, the presence or absence of an economic motive is not what distinguishes protected political expression from unlawful acts of violence or terrorism.

Accordingly, the economic motive test seems to us a poor proxy for the civil liberties issues that can and do arise under RICO. The ACLU takes no position, therefore, on whether the Seventh Circuit's interpretation of RICO was correct in this case. However, if the Court remands this case for trial, either by rejecting the economic motive test or by finding that the Seventh Circuit misconstrued the economic motive requirement, *see* n.5, *infra*, we respectfully submit that the Court's decision should include a set of constitutional guidelines designed to mitigate the civil liberties risks that are inherent in virtually every RICO litigation and that are inevitably magnified when RICO is applied in such a politically charged atmosphere. This *amicus* brief is intended to assist the Court in that effort.

SUMMARY OF ARGUMENT

The complaint in this case was filed as a nationwide class action on behalf of women's health centers that provide abortions and the women who seek abortions at those centers.[2] Of central importance at this stage of the

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[2] The class certification motion was still pending when defendants' motion to dismiss was granted. *National Organization for Women, Inc. v. Scheidler*, 968 F.2d 612, 615 n.3 (7th Cir. 1992).

proceedings, the complaint charges (on behalf of the clinics) that several individuals and groups who are prominently identified with the anti-choice movement violated RICO by operating the Pro-Life Action Network, an umbrella anti-choice organization, through a pattern of racketeering activity.[3]

The complaint sets forth a long list of illegal and/or harassing activities allegedly committed in furtherance of defendants' goal of closing down abortion clinics around the country. Those activities include:

> extortion; physical and verbal intimidation and threats directed at health center personnel and patients; trespass upon and damage to center property; blockades of centers; destruction of center advertising; telephone campaigns designed to tie up center phone lines; false appointments to prevent legitimate patients from making them; and direct interference with centers' business relationships with landlords, patients, personnel, and medical laboratories.

National Organization for Women, Inc. v. Scheidler, 968 F.2d 612, 615 (7th Cir. 1992).

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[3] For purposes of this appeal, the relevant sections of RICO are 18 U.S.C. §§1962(c) and (d). Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 1962(d) penalizes conspiracies to violate any of RICO's substantive provisions, including §1962(c).

The complaint also refers at several points to meetings and demonstrations organized by the defendants, and to the distribution of a manual written by defendant Scheidler that the Seventh Circuit described as "advocat[ing] unlawful methods of interfering with the operations of women's health centers." *Id.* at 615. Defendants point to these allegations as evidence that plaintiffs are seeking to impose RICO liability based on protected First Amendment activity. *See, e.g.*, Scheidler Op.Cert. at 24-25.

The Seventh Circuit, apparently, did not see the complaint as presenting the same threat to First Amendment interests that defendants perceive. In the Seventh Circuit's view,

> the complaint does not attempt to bar all anti-abortion activities. Peaceful picketing, debate, meetings, prayers, and a host of other forms of peaceful protest are protected by the First Amendment. The complaint seeks relief from criminal and tortious activities such as trespass, clinic invasion, vandalism, extortion, and tortious interference with business relationships.

Id. at 616.[4]

In the absence of a trial record, such differing interpretations are not surprising. What is more significant at this pleading stage is the shared understanding by all parties and the court of appeals that, in the event of any trial on remand, the line separating "peaceful protest"

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[4] The RICO case statement submitted by plaintiffs in the trial court alleges numerous instances of the sort of tortious and criminal activity listed in the Seventh Circuit's opinion.

from "criminal and tortious activities" must be carefully maintained. The first is constitutionally protected, the second is properly subject to sanction. Moreover, if sanctions are imposed, it is essential to distinguish between those who are responsible for the unlawful activities and those who are not, especially in a context where lawful and unlawful activities often take place side-by-side.

Fortunately, the Court has dealt with these problems before in other contexts and the rules are reasonably well-settled. The application of those rules to RICO, however, is less well-settled and deserves emphasis.

First, the Constitution does not protect extortion or "true" threats of violence directed at specific individuals. *Watts v. United States*, 394 U.S. 705 (1969)(*per curiam*). It does protect hyperbolic rhetoric and "threats" of social ostracism or even damnation.

Second, when the alleged RICO enterprise is an ideological association, individual defendants may not be held liable unless they played a significant role in the "operation and management" of the enterprise, *see Reves v. Ernst & Young*, 507 U.S. __, 113 S.Ct. 1163 (1993), and had a specific intent to further the association's illegal aims. *E.g., Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 290 (1961).

Third, neither an ideological association nor its leaders can be held derivatively liable for the unlawful activities of its members, under RICO or otherwise, except upon a finding that the association and/or its leaders "authorized or ratified the misconduct in question." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 931 (1982)(citations omitted). Furthermore, a defendant's speech or expressive activity can form the basis for direct liability only if the speech is part of a conspiracy or is intended and likely to produce imminent lawless action. *Brandenburg v. Ohio*, 395 U.S. 444 (1969)(*per curiam*).

We recognize that the propriety of these standards may never be reached if the decision below is affirmed. We have nevertheless chosen to submit this *amicus* brief because we believe that the clear articulation of these standards will ultimately serve the constitutional interests of all sides in this controversy if this case is remanded for trial.[5]

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[5] If this Court affirms the holding below that an economic motive is required under RICO, the existence of such an economic motive cannot be found in the solicitation of voluntary contributions in support of the defendants' protected associational activities. *See* 968 F.2d at 630. The charitable solicitation of funds is a form of speech protected by the First Amendment. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). As this Court has noted, it implicates several distinct speech interests, including: the interest of the organization in soliciting support; the contributor's expression of support for the recipient organization and its views; and the ability of the organization to communicate its ideas to a larger audience. *See Cornelius*, 473 U.S. at 797-99. RICO liability cannot be based on protected First Amendment activity. *See* pp.10-16, *infra*. Consequently, the solicitation of charitable contributions cannot be used as proof of an alleged economic motive under RICO unless the charitable contributions were obtained through illegal coercion or fraud.

We do not take any position in this brief on whether the economic motive test could be met by proof that defendants' activities "were aimed at increasing the plaintiffs' costs of doing business." *Scheidler*, 968 F.2d at 630. Likewise, we express no view on whether it is sufficient to show that defendants committed economic crimes to bankroll their political activities. *See, e.g., United States v. Bagaric*, 706 F.2d 42, 55-57 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983). These issues will need to be resolved if the Court finds that an economic motive test is appropriate.

ARGUMENT

ANY FUTURE PROCEEDINGS IN THIS CASE SHOULD BE TAILORED TO PROTECT THE CONSTITUTIONAL RIGHTS OF ALL PARTIES

If this case is remanded for trial, the trial court will be facing a sensitive task. On the one hand, defendants may not claim any constitutional immunity for unlawful activities designed to interfere with the exercise of plaintiffs' constitutionally protected rights. On the other hand, plaintiffs may not rely on RICO to thwart defendants' lawful political protests even if those protests have the effect of discouraging some women from obtaining lawful abortions. Similarly, defendants may not escape liability for unlawful activities that they authorized, ratified or incited, even if the unlawful activities were actually performed by others. Conversely, any finding of liability must rest on something more than a theory of guilt by association, especially in a context where lawful and unlawful activities are often mixed together.

Although this delicate balance is not unique to RICO, the risk of miscalculation is increased by the amorphous nature of RICO itself. Moreover, the cost of misapprehending the appropriate constitutional lines is magnified under RICO by the availability of treble damages. If the use of RICO is to become commonplace in cases of this sort, RICO lawsuits must proceed with an understanding that "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 908. As this Court clearly stated in *Claiborne Hardware*:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the

> context of constitutionally protected activity, however, "precision of regulation" is demanded. Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.

Id. at 916-17 (footnote and citation omitted).

This statement of principle arose out of a dispute between white merchants in Claiborne County, Mississippi and the local branch of the NAACP, which had organized a seven-year boycott against local businesses that were resisting racial integration. Relying on the fact that some boycott supporters had resorted to violence, the Mississippi courts declared the entire boycott illegal, and awarded crippling damages against the NAACP. This Court unanimously reversed in an opinion that carefully distinguished protected political activity from actionable conduct.

As a threshold matter, the Court ruled that the plaintiffs could only recover for losses proximately caused by unlawful activity; business losses attributable to lawful, nonviolent boycott activity were not compensable. *Id.* at 918. The Court next ruled that individual NAACP members could not be held liable based upon their mere participation in the boycott:

> Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.

Id. at 920. Finally, the Court ruled that the NAACP

could not be held liable for acts of violence committed by boycott participants unless the organization had authorized or ratified their actions. *Id.* at 930-31. "To impose liability without a finding that the NAACP authorized -- either actually or apparently -- or ratified unlawful conduct would impermissibly burden the rights of political association that are protected by the First Amendment." *Id.* at 931.

Each of these principles has relevance here and is likely to be relevant in most other cases where RICO is used against organizations that are accused of seeking to further their ideological goals through unlawful as well as lawful means. Most fundamentally, lower courts confronting RICO claims against ideological associations must carefully distinguish between unlawful conduct, which may give rise to civil liability, and protected conduct, which may not. Here, the shared understanding that this line must be drawn, *see* pp.5-6, *supra*, lessens but does not eliminate the risk of constitutional overreaching.

For example, the complaint in this case includes allegations that the defendants engaged in acts of "physical and verbal intimidation and threats directed at health center personnel and patients." 968 F.2d at 615. An allegation of this sort may or may not present constitutional problems depending on what it actually means and how it is proven. The Constitution does not protect "true" threats of violence directed at specific individuals. *See Watts v. United States*, 394 U.S. at 708. "Threats" of ostracism, vilification or eternal damnation, by contrast, are constitutionally protected speech.

> The claim that the expressions were intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment . . . . Petitioners were engaged openly and vigorously in making the public aware of respondent's . . . practices. Those

> practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But, so long as the means are peaceful, the communication need not meet standards of acceptability.

Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); *see also Claiborne Hardware*, 458 U.S. at 921 ("To the extent that the court's judgment rests on the ground that 'many' black citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and traduction,' it is flatly inconsistent with the First Amendment").

This distinction is as critical under RICO as it was in *Claiborne Hardware*. The central claim in the present complaint is that defendants have violated 18 U.S.C. §1962(c) by operating a RICO enterprise (the Pro-Life Action Network) through a pattern of racketeering activity that includes multiple predicate acts of extortion, which are described at great length in the RICO case statement. *See* n.4, *supra*. In evaluating that claim, it is essential that the lower courts not confuse protected political activities with criminal extortion or use evidence of protected political protest to establish a pattern of racketeering activity.

At the same time, it is equally important for the lower courts to resist the claim that the First Amendment is a shield for criminal behavior. The First Amendment requires a distinction between political protest and criminal extortion. It does not immunize criminal extortion because it is engaged in as a form of political protest.

In similar fashion, the First Amendment compels caution before imposing RICO liability on individual defendants allied with ideological organizations that have both legitimate and illegitimate aims. The Court has long recognized that the imposition of liability under these circumstances poses special constitutional risks:

> There is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.

Noto v. United States, 367 U.S. at 299-300; *see also Scales v. United States*, 367 U.S. at 229-30 (a "blanket prohibition of association with a group having both legal and illegal aims" would create "a real danger that legitimate political expression or association would be impaired"). For this reason, membership in such an organization may not be punished unless an individual joined the organization with knowledge of, and a specific intent to further, its illegal aims. *Claiborne Hardware*, 458 U.S. at 920; *Healy v. James*, 408 U.S. 169, 186 (1972). This constitutional requirement is separate from, and in addition to, RICO's statutory requirement that the defendant participate in the operation and management of the RICO enterprise. *See Reves v. Ernst & Young*, 113 S.Ct. 1163.[6]

Because RICO liability does not turn on mere membership (unlike the Smith Act prosecutions at issue in *Scales* and *Noto*), these constitutional concerns will not normally come into play. There are, nonetheless, cases in which a defendant's participation in an association's activities will be proffered as circumstantial evidence of a RICO violation. It is precisely this circum-

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[6] Thus, one could be a director of an ideological association and committed to its political goals, and yet be personally opposed to furthering those goals through unlawful means. Alternatively, a supporter of the same organization might have the intent to engage in the illegal actions, yet not be involved in the association's operation and management. In neither case could the defendant be held liable under RICO.

stantial inference that is not constitutionally permissible with an ideological association unless there is evidence of a defendant's specific intent to further the illegal aims of the association. Under RICO, that burden will frequently be met by evidence that the defendant is culpable for two or more predicate acts of racketeering activity, a required element in most RICO offenses.[7]

Any effort to hold a RICO defendant vicariously liable for someone else's unlawful behavior in cases of this sort must also be judged against First Amendment standards.[8] *Claiborne Hardware* again establishes the guide-

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[7] This will not always be true in RICO claims brought under § 1962(d), the conspiracy provision. There is a split in the circuits as to whether a defendant charged in a RICO conspiracy must personally agree to commit two predicate acts of racketeering activity or whether it is sufficient that he agree that two predicate acts be committed. *See, e.g., Pryba v. United States*, 498 U.S. 924 (1990)(White, J., dissenting from denial of *cert.*). The majority of circuits have adopted the latter position. *See United States v. Pryba*, 900 F.2d 748, 760 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990)(collecting cases). In these circuits, in particular, there is a danger that a court might attempt to infer a defendant's agreement from his participation in the operation of the ideological association and the commission by his "co-conspirators" of acts of racketeering. The First Amendment forbids this inference without some direct evidence of the defendant's specific intent to further the organization's illegal aims. *Claiborne Hardware*, 458 U.S. at 918-19; *see also DeJonge v. Oregon*, 299 U.S. 353, 365 (1937):

> If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

[8] Lower courts have consistently held that a civil RICO defendant may be held vicariously liable for predicate acts of racketeering as an aider and abetter. *See, e.g., Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1356-60 (3d Cir. 1987).

lines. In that case, the plaintiffs sought to hold Charles Evers, the NAACP's Field Secretary in Mississippi, liable on the basis of several speeches he had given in which he called for violence against boycott breakers. The Court ruled that these speeches alone could not provide a basis for liability:

> There are three separate theories that might justify holding Evers liable for the unlawful conduct of others. First, a finding that he authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity. Second, a finding that his public speeches were likely to incite lawless action could justify holding him liable for unlawful conduct that in fact followed within a reasonable period. Third, the speeches might be taken as evidence that Evers gave other specific instructions to carry out violent acts or threats.

458 U.S. at 927. Because there was no other evidence that Evers had authorized, ratified, or directly threatened unlawful conduct, nor any evidence that his remarks had precipitated violence by others, the judgment against him could not be sustained. *Id.* at 927-29.

The same rules should apply to the present case. The individual defendants cannot be held liable based upon speeches advocating or endorsing unlawful action unless defendants' words (1) authorized, ratified or directed the illegal actions, or (2) constituted illegal incitement under the test set forth in *Brandenburg v. Ohio*, 395 U.S. at 447:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such

> advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Likewise, the defendants cannot be held liable for failing to disavow violent or criminal acts, because "[a] legal duty to 'repudiate' -- to disassociate oneself from the acts of another -- cannot arise unless, absent the repudiation, an individual could be found liable for those acts." *Claiborne Hardware*, 458 U.S. at 925 n.69.

Claiborne Hardware also establishes the rules of liability for the organizational defendants in this case -- Operation Rescue, the Pro-Life Action League, the Pro-Life Direct Action League, and Project Life. They may be held responsible for the acts of their agents undertaken within the scope of their actual or apparent authority. *Id.* at 930, citing *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982). They may also be held liable for other action of which they had knowledge and specifically ratified. 458 U.S. at 930. However, they may not be held liable for the actions of their supporters undertaken without their authorization or ratification. As this Court concluded in *Claiborne Hardware*:

> To impose liability without a finding [of actual or apparent authorization or ratification] would impermissibly burden the rights of political association that are protected by the First Amendment . . . . "The rights of political association are fragile enough without adding the threat of destruction by lawsuit."

Id. at 931-32, quoting *NAACP v. Overstreet*, 384 U.S. 118, 122 (1966)(Douglas, J., dissenting from dismissal of *cert.*).

Application of the foregoing principles to civil RICO actions brought against ideological associations will re-

quire the lower courts to draw some fine distinctions between protected and impermissible conduct. But such careful line drawing is critical if our courts are to be respectful of the constitutional rights of all of the parties to the underlying dispute: the rights of women to obtain safe and legal abortions free from the threat of violence and the rights of anti-choice protesters to attempt peacefully to dissuade them from this course.

This Court concluded its opinion in *Claiborne Hardware* with a command to lower courts to be attentive to such distinctions:

> The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott . . . [It] must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity.

458 U.S. at 933-34.

CONCLUSION

The epidemic of violence against abortion clinics throughout the country demands a strong remedial response. The use of civil RICO as that remedy, however, poses its own problems. Accordingly, if a remand is ordered, we respectfully urge the Court to use this case as an opportunity to establish a clear set of constitutional guidelines for the lower courts, modeled in large measure upon the decision in *Claiborne Hardware*. In our view, such guidelines will go a long way toward protecting both the right to reproductive choice and the right to peaceful political protest.

Respectfully submitted,

Louis M. Bograd
(*Counsel of Record*)
American Civil Liberties Union
Foundation
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-1681

Steven R. Shapiro
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

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Supreme Court of the United States

October Term, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Petitioners,

v.

JOSEPH M. SCHEIDLER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* OF OHIO RIGHT TO LIFE SOCIETY, INC., CLEVELAND LAWYERS FOR LIFE, INC., PHYSICIANS FOR LIFE, INC. IN SUPPORT OF RESPONDENTS

DAVID F. FORTE
(Counsel of Record)
Cleveland-Marshall College
of Law
Cleveland State University
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-2342

Attorney for Amici Curiae

Dated: September 29, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICI

Amici Ohio Right To Life Society, Inc., Cleveland Lawyers for Life, Inc., and Physicians for Life, Inc., are not-for-profit organizations of citizens and professionals seeking to secure respect and protection for human life at all stages of being by legal means. Amici do not subscribe to non-legal forms of protest. Nonetheless, aware of the great moral and emotional contest over the issue of abortion, Amici do not believe that it would serve the cause of informed public debate for the contest to focus on the courts, especially through unconstrained private suits. Amici do not believe that Congress intended, nor the text or history of the RICO statute permit, the extension of the criminal and the extraordinarily flexible civil action provisions to cover non-economic entities or non-economic motivations for predicate acts. To transform ambiguous provisions into actionable predicates would go beyond congressional intent, alter the federal-state balance, and further exacerbate the rancorous debate over the issue of abortion.

SUMMARY OF ARGUMENT

Amici contend that the ordinary canons of statutory interpretation support the Seventh Circuit's conclusion below that the Racketeer Influenced and Corrupt Organizations ("RICO") chapter of the Organized Crime Control Act of 1970, Pub.L. 91-452, Title IX, 84 Stat. 941 (1971), requires an economic element in the terms "enterprise" and in the predicate acts subject to its provisions. *NOW v. Scheidler*, 968 F.2d 612, 626-29 (7th Cir. 1992). The issue,

however, only arises because of the evident ambiguity in the concept of "enterprise" within 18 U.S.C. § 1962(c) (1989), and in the type of motivation required for a predicate act. It is that ambiguity and its clarification which Amici address in this brief.[1]

Ambiguity occurs where a statutory term has alternative or contradictory referents. Amici contend that when a congressional statute intrudes upon fundamental constitutional or structural interests, the clear statement rule is the appropriate mechanism to resolve any ambiguity in statute's terms or application. Moreover, whenever such constitutional or quasi-constitutional interests are at stake, the clear statement rule establishes a high threshold, analogous to the clear and convincing standard of proof for finders of fact, that must be met to find that Congress did indeed intend to intrude upon the traditional structures of the American constitutional order.

The civil provisions of RICO are, and were intended to be, an adjunct to the criminal proscriptions designed to attack the economic strengths of organized crime and of commercial criminality generally. Petitioners have brought a civil action under federal law against Respondents by alleging that Respondents have engaged in non-economic behavior that would normally be dealt with by the criminal codes of the several states. The defining and penalizing of criminal behavior is traditionally a function of the state legislatures. Under Petitioners' view of RICO,

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[1] Letters of consent to the filing of this brief are on file with the Clerk of the Court.

the decision whether to subject individuals and enterprises to civil prosecution is made on a case by case basis by persons who are not politically accountable. Yet the method of enforcing and prosecuting such proscriptions is a core part of the discretion of the executive departments of the individual states and their subdivisions.

Accordingly, under Petitioners' own interpretation of the applicable provisions of RICO, Congress has altered the federal-state balance and intruded upon the core functions of the states by delegating prosecutorial decision making to politically unaccountable actors. Under the interpretive precedents of this Court, the clear statement rule provides a basis for resolving the dispute with due respect for the powers of Congress and the role of the states whenever those fundamental interests may be intruded upon by Congress. The rule mandates that Congress leave no ambiguity in RICO if the intent of Congress was to make such a wide range of non-economic activity subject to federal sanction.

Finally, under the private civil enforcement portion of RICO, 18 U.S.C. § 1964(c) (1989), permitting treble damages and lawyer's fees, Respondents would be subject to far greater penalties than under state criminal prosecution, if Petitioners' expansive view of Respondents' liability under Section 1962(c) is countenanced. If Respondents are in fact subject to a potentially greater penalty under the civil provisions of RICO than they would be under the criminal laws of the states, and there is a genuine ambiguity in the meaning of the text, then, under the rule of lenity, any such ambiguity should be resolved in favor of the lesser penalty.

ARGUMENT

I. CONGRESS DID NOT CLEARLY INTEND SECTION 1962(C) OF RICO TO REACH ENTERPRISES OR PREDICATE ACTS THAT ARE NON-ECONOMIC

Petitioners below sought treble damages and lawyer's fees under 18 U.S.C. § 1964(c) (1989) by alleging that Respondents violated 18 U.S.C. § 1962(c) (1989) through the commission of predicate acts defined within 18 U.S.C. § 1961(1) (1989).[2] Central to Petitioners' cause of action is the notion that the "enterprise" of the Respondents, as found in Section 1962(c), need not be economic or commercial, and that the motivation for the alleged predicate

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[2] Section 1964(c) reads:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Section 1962(c) reads:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The relevant portion of Section 1961(1) reads:

"racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1951 [the Hobbs Act] (relating to interference with commerce, robbery, or extortion). . . .

acts need not require an economic element. Brief of Petitioners at 15-25. In a reasoned exercise in statutory interpretation and case law, the Seventh Circuit below dismissed plaintiffs' cause of action, stating, "[W]e believe that congressional concerns may not have extended so far as the activities of political terrorists which involve neither economic crimes nor economic motivations." *NOW v. Scheidler*, 968 F.2d at 628 (adopting the reasoning of *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983)).

The issue of the case comes down to defining the content of two ambiguous elements in RICO, "enterprise" and motivation, and the constitutionally appropriate method for resolving the ambiguities.

A. "Enterprise" and the Requisite Motivation for Predicate Acts Are Ambiguous Concepts Within RICO

Although Amici are persuaded of the Seventh Circuit's conclusions,[3] the fact is that the text of Section 1962(c) is ambiguous in its definition of enterprise and in the required motivation for the predicate acts. The clear

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[3] Amici also associate themselves with Brief of Respondents Joseph M. Schiedler, et al., in contending that the text, context, structure, legislative history and application of RICO point to the statute's requirement of a commercial element for each covered enterprise or predicate act. Nevertheless, the court below and Respondents base their conclusions on the evident fact that there is some element of ambiguity in the two elements at issue. Amici contend that the clear statement rule can and should be applied to resolve that ambiguity.

statement rule provides the appropriate standard for resolving those ambiguities.

A statutory provision is ambiguous when it is capable of bearing "at least two meanings." *Deal v. United States*, 113 S.Ct. 1993, 1997, n.1 (1993) (holding that the term "conviction" did not, in context, have more than one meaning).[4] Language is symbolic and nearly always refers to a concept or concepts outside of itself.[5] Ambiguity is a description of relative uncertainty, found wherever language can have variable signification. A statutory provision is ambiguous if it has alternate or contradictory referents. A reference to "residence," for example, may mean an abode or a legal domicile.[6] Similarly, ambiguity may also be present when an unstated material element

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[4] The Oxford English Dictionary (O.E.D.) defines ambiguity as the "capability of being understood in two or more ways." 1 O.E.D. 386 (2d ed. 1989). Consequently, the first rule of statutory interpretation, relying on the plain meaning of the language, does not apply. *See* SANDS, SUTHERLAND STAT. CONST. § 46.01 (4th ed. 1984) (plain meaning of language "admits of no more than one meaning").

[5] C.K. OGDEN & I.A. RICHARDS, THE MEANING OF MEANING 9-10 (8th ed. 1948).

[6] REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 23 (1965). Unlike homonyms, where the same term used twice carries discernibly different referents, (e.g., "the bear's owner bears liability") ambiguity occurs when the term does not limit itself to one series of harmonious symbols. *Id.* at 24.

An ambiguity may also occur when it is not clear whether the particular term stands for a narrow or a broad range of allied symbols. See, for example, the debate within the Court on the meaning of the term, "use" of a firearm. *Compare Smith v. United States*, 113 S.Ct. 2050, 2054 (1993) *and id.* at 2061 (Scalia, J., dissenting).

within the statute is not defined, leaving it without a clear referent.[7]

In the issue before the Court, there are alternative referents for the term "enterprise" within Section 1962(c). An enterprise could be "a business venture or undertaking," BLACK'S LAW DICTIONARY 79 (6th ed. 1990), or simply "an undertaking, a project." WEBSTER'S NEW 20TH CENTURY DICTIONARY 606 (2d ed. 1983). Moreover, it is not clear within the terms of RICO whether the motivation for committing any of the predicate acts in incurring liability must be economic.

In determining what a statutory term's referents are, a court will utilize a number of interpretive modes and maxims, often progressively moving to different frameworks of definition.[8] Commonly, the court fixes on the term's definition within the statute. *See, e.g., Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) ("racketeering activity" in RICO limited to definitions in Section 1961(1)). Alternatively, the court will look to the term's legal or "ordinary meaning" in the language. *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990) (citations omitted). But perhaps most frequently, the court will seek illumination of meaning of the term in the context of other words in

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[7] Beyond semantic ambiguity of terms, there can also be syntactic ambiguity, arising from the confusing placement of modifiers, as well as contextual ambiguity, in which two or more parts of a statute are inappropriately made parallel. *See* REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING at 73-97.

[8] If an ambiguity is impossible to resolve, then a statute may be unconstitutionally vague, but the canons of statutory construction normally work to avoid that result. SANDS, SUTHERLAND STAT. CONST. § 21.16.

the statute, or in the statute's purposes, or in its legislative history.[9] In *Reves v. Ernst & Young*, 113 S.Ct. 1163 (1993), for example, this Court examined the content of the terms "to conduct or participate" in an enterprise's affairs within Section 1962(c). In attempting to resolve any uncertainty in the meaning of the terms, the Court looked to varying definitions, the context of Section 1962(c), the purpose of RICO and its legislative history. The Court found that "to conduct or participate" in an enterprise's affairs was limited to having a managerial or directive role in the enterprise. 113 S.Ct. at 1169-71.

Other case analyses of the "sometimes ambiguous language" of RICO, *Plount v. American Home Ins. Co.*, 668 F. Supp. 204, 206 (S.D.N.Y. 1987), have utilized the tools of statutory interpretation to unravel complexities of meaning,[10] often directly confronting the question of ambiguity.[11]

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[9] Courts will also use contextual maxims, such as *ejusdem generis, expressio unius est exclusio alterias,* and *in pari materia* to gloss a term's meaning. SANDS, SUTHERLAND STAT. CONST. § 47.

[10] This Court has applied methods of context, purpose, and history to resolve the meaning of terms that may have had some facial ambiguity. *See Reves*, 113 S.Ct. at 1169 ("conduct" in Section 1962(c) means that a defendant must have had "some degree of direction" in the enterprise); *Sedima*, 473 U.S. at 495 ("racketeering activity" in Section 1962(c) means no more than the predicate acts listed under Section 1961(1)); *Russello v. United States*, 464 U.S. 16, 22 (1983) ("interest" in 18 U.S.C. § 1963(a)(1) (1989) includes money or profits); *United States v. Turkette*, 452 U.S. 576 (1980) (an "enterprise" may comprehend illegitimate associations, but not a "pattern of racketeering activity").

[11] In *United States v. Masters*, No. 88-CR500-1, 1989 U.S. Dist. LEXIS 6142 (N.D.Ill. May 12, 1989), for example, the court specifically found that the term "enterprise" was ambiguous as

To resolve the ambiguity in Section 1962(c) whether an enterprise can include any form of undertaking, even one without an economic component, the court below employed context and case law. 968 F.2d at 626-29. In their Brief, Respondents marshal impressive evidence to demonstrate that enterprises and predicate acts are limited to commercial or economic entities and motives. Appropriate to settling the question, however, is the clear statement rule, a canon of construction long used by this Court. Its application will resolve any remaining ambiguity in favor of Respondents.

B. The Clear Statement Rule Requires That Congress Clearly Show That 18 U.S.C. § 1962(c) Was Intended to Apply to Non-Economic Enterprises or Predicate Acts

The clear statement rule will be invoked to resolve an ambiguity when a statute trenches upon traditionally important interests in our constitutional order. *United States v. Bass*, 404 U.S. 336, 349 (1971). If Congress seeks to regulate an area normally outside its purview, it must make its intent clear, unmistakable, or manifest. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1988). The

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applied to groupings of associations as distinguished from groups of individuals. To resolve the ambiguity, the court applied the canon of statutory purpose to include groupings of associations within the statute's concept of "enterprise." In contrast, the Second Circuit found that there was "no ambiguity" in the words of the statute in applying its provisions to public utilities. *City of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990).

rule provides a grounding to statutory interpretation in areas where Congress may have inadvertently impinged upon constitutional or quasi-constitutional interests. The interpretive evidence must be sufficiently weighty to indicate that Congress clearly intended the extension of its power to such a degree. "[T]o depart from an established *principle*, the legislature must speak plainly." Harry Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L. J. 221, 264 (1973) (emphasis in original).[12]

The rule affirms the political checks upon the legislative process. It requires that where Congress has the capacity to govern, Congress must exercise its rule clearly and articulately when its legislation may affect areas of the American polity traditionally enjoying a range of discretion free from federal or congressional regulation. The Court has been particularly vigilant when Congress, as in RICO, has exercised its enormous powers under the Commerce Clause. U.S. CONST. art. I, § 8.

> A law will not be held to affect all the activities Congress can control unless statutory language or legislative history constitutes a *clear statement* that Congress intended to exercise its commerce power in full.

LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 316 (2d ed. 1988) (emphasis in original).

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[12] In constitutional terms, the clear statement doctrine is the analogue of the maxim that statutes in derogation of the common law should be strictly construed. *See, e.g., United States v. Rodgers*, 461 U.S. 677, 716 (1983) ("[T]he Court has presumed in the absence of a clear indication to the contrary that Congress

When Congress intrudes upon traditional state interests under the Commerce Clause, the protection of the States lies primarily in the political process, *Garcia v. Metropolitan Transit Auth.*, 469 U.S. 528 (1985). In such a situation, the Court "must be absolutely certain that Congress intended such an exercise." *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2403 (1991). By means of the Supremacy Clause, U.S. CONST. art. VI,

> Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federal system. It is a power that we must assume that Congress does not exercise lightly.

Id. at 2400.

By requiring that the results of the political process be unambiguous, the Court also protects its own capacity and its own role to assay what the law is. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). "[T]he requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. at 349.

Accordingly, courts have required a clear statement when a statute purports to alter the federal-state balance, particularly in criminal matters under the Commerce Clause, *id.*, or when it may impinge upon a state's core functions, *Ashcroft*, 111 S.Ct. at 2400-01, or limit a state's immunity from suit under the Eleventh Amendment,

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did not mean by its use of general language to contravene fundamental precepts of the common law") (Blackmun, J., dissenting).

Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242-43 (1985), or condition the grant of federal funds to states, *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 24 (1981), or preempt an activity historically regulated by the states, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citations omitted), or constrain judicial review of administrative decisions, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), or violate a rule of international law, *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), or extend extraterritorial jurisdiction, *EEOC v. Arabian American Oil Co.*, 111 S.Ct. 1227, 1229-30 (1991) (citations omitted), or regulate First Amendment interests, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 506 (1979), or curb a federal privilege or immunity, *Kent v. Dulles*, 357 U.S. 116, 129 (1958), or, in general, delegate "critical decisions, especially those implicating constitutional values, to less politically accountable agents." Evan Carminker, *A Norm-based Remedial Model for Underinclusive Statutes*, 95 YALE L. J. 1185, 1206 (1986) (noting that the clear statement rule has become a substitute for the non-delegation doctrine).

As an "ordinary rule of statutory construction," then, the clear statement rule is applied whenever it is asserted that Congress intended to alter the "usual constitutional balance" between the Federal government and the states. *Will*, 491 U.S. at 65 (citations omitted). Its function is to "divine the meaning of otherwise ambiguous statutory intent." *EEOC v. Wyoming*, 460 U.S. 226, 224, n. 18 (1983), and serve as a background context for evaluating the interpretive evidence.

For the interpreter of the statute, the clear statement rule serves the same function as does the clear and

convincing standard for the finder of fact. The clear and convincing standard protects "particularly important individual interests in civil cases." *Addington v. Texas*, 441 U.S. 418, 424 (1978). The interests protected by the clear statement rule "derive from the Constitution itself." *Hilton v. South Carolina Pub. Rys. Comm'n*, 112 S.Ct. 560, 567 (1991) (O'Connor, J., dissenting). Because certain interests are so fundamental to our legal order, a higher burden than preponderance is placed on the party asserting that the interest has been overcome.

In the ordinary situation, where there are no fundamental interests at stake, the usual maxims of statutory interpretation resolve any ambiguity on the basis of preponderance of the relevant data or principles. But in other situations, where constitutional and quasi-constitutional presumptions operate against Congress' exercise of its acknowledged power, then a greater level of persuasiveness is required. That is the function of the clear statement rule.[13]

On the other hand, it is often stated that if there be "no ambiguity" whatever, the clear statement rule does not apply. *City of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1305-06 (2d Cir. 1990). Analytically, however, when a court says that there is "no ambiguity," the court in fact has decided that the statute's meaning has met the clear statement rule from the outset, and that there is no need to invoke it explicitly to limit the purported sweep

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[13] William Eskridge, *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007, 1065 (1989).

of the provision. Thus, if a court finds that the intent of Congress to enter an area traditionally reserved to the states is evident on the face of the statute, then Congress has *a fortiori* met its burden under the clear statement rule, and the court need go no further. A finding of "no ambiguity" simply restates the conclusion that the high level of "proof" required by the rule has been met. Indeed, in some cases this Court has declared that the clear statement rule *requires* that there be "no ambiguity." *Atascadero*, 473 U.S. at 242 (Congress's intent must be "unmistakably clear in the *language* of the statute") (emphasis supplied).

If, on the other hand, the clear statement rule did not provide a background context for evaluating the interpretive evidence from the start when fundamental interests were at stake, but was only brought in at the end of the day when the traditional canons of statutory construction yielded no answer, there would hardly be any occasion for its use. Rare indeed would there be a provision whose statutory definition, or dictionary definition, or contextual use, or relation to the purpose of the legislation, or place in the legislative history, or its gloss by other maxims of statutory interpretation would still fail to have some preponderant meaning. But the clear statement rule demands more than mere preponderance. It sets a higher threshold for the evaluation of the interpretive evidence in all cases when Congress moves into areas outside its traditional purview.

In the case at bar, any clear Congressional intent to include non-economically motivated offenses within the scope of RICO cannot be found in the text or legislative

history. The statute aims at illegal commercial combinations and activities. Any indication otherwise is, at most, ambiguous. At the same time, the statute trenches upon the traditional federal-state balance in criminal matters, and redirects the states' core power of choosing how to enforce criminal proscriptions. For either or both of these considerations, Congress is obligated to have made its intention clearly stated before modifying such fundamental structures and interests of the American constitutional system. It has not done so.

1. Congress Did Not Clearly Intend to Alter So Dramatically the Federal-State Balance by Including Non-Economic Enterprises or Predicate Acts within the Prohibitions of RICO

As part of the Organized Crime Control Act of 1970, RICO was obviously designed to involve the federal government in a far greater degree in combatting the influence of organized crime on the economy of the nation than ever before. The change in the federal-state balance was dramatic, and, in terms of economically motivated delicts, intentional. *Turkette*, 452 U.S. at 586-87 (citations omitted). But there is no indication that Congress meant to federalize such a wide range of non-economically motivated crimes as Petitioners would desire.[14] Any such objective of Congress would have to be stated clearly.

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[14] In their complaint below, Petitioners assert the violation of a federal statute, 18 U.S.C. 1951 (1989) (the Hobbs Act), as a predicate act to Respondent's liability. However, if the concept of "enterprise" and the requisite motivation for predicate acts are expanded to include non-economic entities and purposes, then not only would a wider range of predicate acts under

> [W]henever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear.

Bowen v. American Hosp. Ass'n, 476 U.S. 610, 645 (1985) (plurality), quoting *Florida v. United States*, 282 U.S. 194, 211-212 (1931). Without a clear statement, this Court will not "transform relative minor state offenses into federal felonies." *Rewis v. United States*, 401 U.S. 808 (1970).

The transformation of ordinary non-economically motivated state criminal law into a federal cause of action would be a singular change in our federal system, made all the more dramatic because of the effect of Section 1964(c), which Petitioners wish to take advantage of. Civil in form, and modeled after the Clayton Act, 15 U.S.C. § 26 (1989), private treble damages actions are part of a wide ranging criminal statute and are dependent upon acts that are in fact criminal. Yet Section 1964(c) was passed by Congress almost as an afterthought, and with hardly any forethought. Added in the House of Representatives after the Senate had passed its form of RICO, the Senate merely acquiesced in the House's action. The question did not even go to a Conference Committee. The new private enforcement action simply "slipped quietly into the statute." *Sedima*, 473 U.S. at 507, 519 (Marshall, J.,

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federal law be available for treble actions damages, an extraordinary amount of state law under Section 1961(1), not directed at commercial crime, will have been federalized.

dissenting).[15] To infer that Congress meant to federalize ordinary non-economically motivated state criminal law through private action by such a casual process is both dubious and inappropriate in our federal system.

It is precisely to guarantee that states are represented in a process that can undo their own considered policies that the clear statement rule arises. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, 480 (2d ed. 1988), quoted in *Ashcroft*, 111 S.Ct. at 2403 (emphasis in original). No such statement is in the statute. No such intent is clearly evinced in the debates.

It is true that the provisions of RICO are to be "liberally construed to effectuate its remedial purposes," Pub.L. 91-452, § 904(a), 84 Stat. 947 (1971), but the objective which the statute was designed to remedy was to break the deleterious hold that organized crime had on the interstate economy, and, indeed, "to seek the eradication of organized crime in the United States," Pub.L. 91-452, 84 Stat. 922, 923, by attacking "organized commercial exploitation" generally. 116 CONG. REC. S18940 (daily ed. June 9, 1970) (remarks of Senator McClellan). There is no ambiguity in Congress's casting a broad net over illegal commercial activities to snare the organized criminal. *H.J. v. Northwestern Bell Tel. Co.*, 109 S.Ct. 2893, 2905

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[15] Section 1962(c)'s "entrance [into the statute] evinces absolutely no intent to revolutionize the enforcement scheme, or to give undue breadth to the broadly worded provisions." 473 U.S. at 519 (Marshall, J., dissenting).

(1989). But as the Court noted in *Reves*, "RICO's 'liberal construction' clause . . . is not an invitation to apply RICO to new purposes that Congress never intended." 113 S.Ct. at 1172. Accordingly, the civil remedies of Section 1964 find their utility "in eradicating organized crime from the social fabric," *Turkette*, 452 U.S. at 585, not in reaching non-economic activities that private plaintiffs may now wish to target. "The aim," the Court has said of the civil remedies provisions, "is to divest the association of the fruits of its ill-gotten gains." *Id.*

In permitting Congress to attack organized crime at all levels in our country, the Court has allowed for a very wide amount of overinclusiveness in the statute. *Sedima*, 473 U.S. at 497. Drawing a line between what is "organized crime" and what are other forms of criminal economic consortia is problematic. The result is that the vast majority of private action suits have nothing to do with organized crime. Report of the Ad Hoc Civil RICO Task Force of the ABA Section on Corporate, Banking and Business Law 499, n.16 (1985). But to extend RICO to a category of activities having no tangential connection to organized crime is to go far beyond the intention of Congress. It would upset the federal-state balance on a mere mechanical inference. The clear statement rule requires more. As the Eighth Circuit declared,

> [A]n expansive definition of the term "enterprise" will not necessarily effectuate the remedial purpose of RICO to eliminate the infiltration of racketeers into our business economy.

United States v. Anderson, 626 F.2d 1358, 1370 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). If, under the

Commerce Clause, Congress wanted to do more, it was obliged to indicate it clearly.[16]

2. The States' Core Power to Enforce Their Own Criminal Laws May not be Altered or Delegated to Politically Unaccountable Agents by Congress without an Explicit Statement of Intent

In passing RICO, Congress not only federalized a large component of state criminal law, but, through Section 1964(c), Congress also redirected the manner in which such state law should be enforced for economically motivated crimes. Congress, however, has not clearly indicated its intent to remove discretionary enforcement powers from the states' executives and delegate them to politically unaccountable actors who may civilly prosecute non-economically motivated crimes. Accountability to the public for the formulation and execution of public policy is essential to the functioning of our separated and diffuse governmental structure. *Morrison v. Olson*, 487 U.S. 654, 731 (1988) (Scalia, J., dissenting).

Where *Bass* requires that Congress utilize a clear statement when impinging on a state's legislative powers, 336 U.S. at 349, *Ashcroft* requires an explicit intent if Congress seeks to alter the state's method of formulating

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[16] *See, for example, McNally v. United States*, 483 U.S. 350 (1987) (in absence of clear statement by Congress, Court will not read mail fraud statute expansively to impinge upon local standards for government officials); *United States v. Yokley*, 542 F.2d 300 (1976) (Hobbs Act limited to "racketeering" to leave ordinary state criminal offenses free from federal ambit).

public policy, including its executive discretion in enforcing the law. 111 S. Ct. at 2401-02 (citations omitted) (affirming the states' essential interest in formulating public policy). Congress must explicitly provide for any such reallocation of state executive authority.

> The maintenance in our federal system of a *proper distribution* between state and national governments *of police authority and of remedies private and public for public wrongs* is of far reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 513 (1940) (emphasis supplied).

Private actors are not bound by the same policy constraints as are public officials. "Unlike the Government, private litigants have no reason to avoid displacing common-law remedies." *Sedima*, 473 U.S. at 504 (Marshall, J., dissenting).[17] The incentives for a group committed to make public policy by private attorney general suits is great. Acts which are mere misdemeanors under state criminal law can wreak a far greater penalty on the

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[17] The fact that a number of state attorneys general, including the Attorney General of Ohio, have entered an amicus brief on behalf of Petitioners is itself disturbing, for they ask that this Court infer from an ambiguous provision a wholesale change in the states' manner of enforcing state law without either Congress or the states' own politically accountable institutions directing such a change. If the law enforcement mechanisms of the states are indeed so stretched to the limit that they cannot contend with abortion protesters' violations of state law, then the attorneys general should repair to their own legislatures to authorize the citizenry to enforce the law through private attorney general actions.

actor under Section 1964(c). The treble damages provision and the application of attorney's fees can easily exceed any possible fine the defendant may be liable for under state criminal law.[18] Furthermore, since liability is attached by a preponderance of the evidence, the chances of one being found liable are far greater than in a state criminal proceeding.

If setting the agenda of the states' legislative process can be intrusive, *FERC v. Mississippi*, 456 U.S. 742, 779-81 (1982) (O'Connor, J., dissenting), how much more so is displacing the executives' discretion in prosecutorial enforcement. *See Morrison v. Olson*, 487 U.S. at 696 (Executive retains sufficient control over independent prosecutor to perform his duties) and 706 ("Governmental investigation and prosecution of crimes is a quintessentially executive function") (Scalia, J., dissenting). Under our mixed system of government, executive officials remain accountable to the people of their respective states for the exercise of prosecutorial discretion. Private attorneys general actions remove the element of political accountability from those who bring their fellow citizens before the bar of justice. The state's prosecutors are not involved, nor are the federal. The restraint of prosecutorial discretion is no bar. *Sedima*, 473 U.S. at 503-04 (Marshall, J., dissenting) (comparing the responsible use of prosecutorial discretion under RICO with the lack of restraint by private parties in civil prosecutions).

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[18] *See Northeast Women's Ctr. v. McMonagle*, 889 F.2d 466 (3rd Cir. 1989) in which an award of $2,661 in treble damages was enhanced by provision of attorney fees and costs of $64,946.11. 889 F.2d at 470.

If, under the Commerce and Supremacy Clauses, Congress decides to federalize an area of the criminal law and delegate part of its enforcement to the private interests of individuals, it may do so, but it must do so openly and clearly. The clear statement rule guarantees that, through the political process, the states are fully apprised of the change in their respective policies and powers. Congress remains accountable. But if Congress has not clearly articulated its intent to modify or displace state prosecutorial discretion, and the courts do so by judicial decision, "the accountability of both state and federal officials is diminished." *New York v. United States*, 112 S.Ct 2408, 2424 (1992).

Congress' intent to alter one of the core powers of the states in attacking organized crime, illegal commercial combinations, as well as economically motivated crimes generally, has been authenticated. *Sedima*. But if Congress truly intended to convert entire areas of non-economically motivated state criminal law, and to redirect the manner of its enforcement through treble damages suits based on preponderance of the evidence, then it behooved Congress to say so explicitly. The federal courts do not favor "implied inroads in state authority." *West Helena S. & L. v. Federal Home Loan Bank Bd.*, 417 F.Supp. 220, 229 (1976), *aff'd*, 553 F.2d 1175 (8th Cir. 1977).[19]

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[19] In *Santa Fe Industries v. Green*, 430 U.S. 462 (1977), the Court refused to infer a private right of action in the Securities Exchange Act of 1934 without a clear indication of Congress because it would undermine state policies of corporate regulation.

Congress can encourage private actions suits to further federal policy. Where it has done so, it has done so explicitly. Congress can provide for variable punishments for the same offense. Where it has done so, it has done so explicitly. But Congress has not done so in the terms of Section 1962(c) as it is enforced through Section 1964(c). National power should not be placed in the hands of private groups with their own policy agendas without deliberate and considered action by Congress. Such a fundamental change in the manner in which the states enforce their own statutes, so far from the purpose of combatting commercial crime, should not be acquiesced in by mere inference. Otherwise, an unjustifiably expansive interpretation of Section 1962(c), together with Section 1964(c) will do more than just alter the federal-state balance. It will actually displace the state criminal enforcement process without the political accountability for such a change at either the state or federal level.

II. UNDER THE RULE OF LENITY, ANY AMBIGUITY IN THE MEANING OF ENTERPRISE OR IN THE MOTIVATION FOR PREDICATE ACTS SHOULD BE RESOLVED IN FAVOR OF THE LESS HARSH PUNISHMENT

Howsoever the term enterprise is defined in Section 1962(c), howsoever are motivations delineated, the result will apply to criminal as well as civil actions. *H.J. v. Northwestern Bell*, 109 S.Ct. at 2909 (Scalia, J., concurring). If there be one pole star that has guided common law courts in their reading of criminal statutes, it is *nullum crimen sine lege*, the principle that "no conduct may be held criminal unless it is precisely described in a penal

law." JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 28 (2d ed. 1960).[20] It is, indeed, a grounding to the rule of law itself. As Chief Justice Marshall affirmed,

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

In criminal statutes, the clear statement doctrine finds its sibling in the rule of lenity. Strict construction and the rule of lenity in defining ambiguous statutes go hand in hand.

> [W]hen a choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.

United States v. Universal C.I.T. Credit Corporation, 344 U.S. 218, 221-22 (1952). The Court will look to see if Congress has fixed the penalty "for a federal offense clearly and without ambiguity." *Bell v. United States*, 349 U.S. 81, 84

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[20] The alternative formulation, referring both to indefinite laws and indefinite penalties is *nullum crimen, nulla poena, sine lege*. *Sparf and Hansen v. United States*, 156 U.S. 51, 87 (1895).

(1954). If not, "doubt will be resolved against turning a single transaction into multiple offenses." *Id.*

Where Congress clearly wants the harsher alternative, the rule of lenity is of no avail. But where, as here, the Court must choose between two meanings of an ambiguous statute, one of which will subject a defendant to possible federal prosecution and greater penalties under private action, the rule of lenity requires the less harsh alternative. In *United States v. Enmons*, 410 U.S. 396 (1973), declaring that "any ambiguity must be resolved in favor of lenity," *id.* at 411, this Court resisted the Government's call for an expanded reading of the Hobbs Act to cover damage to property resulting from union activity. Similarly, the desire to expand the term enterprise in the case *sub judice* must be rejected. If Congress wishes to expand the list of culpable acts and increase the range of penalties to be attached to them, it must say so forthrightly.

CONCLUSION

Congress may at any time expand RICO to encompass non-economic enterprises or predicate acts. If it does so clearly and unambiguously, the participation of the states in the political process will be guaranteed, the change in federal-state relations will have been consented to by those who must bear the brunt of the change, and those who may be subject to enhanced penalties will know what lies in store. Until that happens, ambiguities

in RICO must be resolved in favor of Respondents. The decision of the Seventh Circuit should be affirmed.

Dated: September 29, 1993

Respectfully submitted

DAVID F. FORTE
(Counsel of Record)
CLEVELAND-MARSHALL COLLEGE
OF LAW
CLEVELAND STATE UNIVERSITY
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-2342

Attorney for Amici Curiae

APPENDIX

DESCRIPTION OF *AMICI*

OHIO RIGHT TO LIFE SOCIETY, INC.

The Ohio Right to Life Society is a non-for-profit non-denominational organization of citizens of the State of Ohio who promote respect for human life at all stages of development. The primary purpose of the Ohio Right to Life Society is to present fully detailed and factual information upon which individuals and the general public may make an informed decision about the various topics of fetal development, abortion, alternatives to abortion, euthanasia, and infanticide. The Society seeks to make available factual information concerning support systems and services for women who are or may be pregnant and in need of assistance.

CLEVELAND LAWYERS FOR LIFE, INC.

Cleveland Lawyers for Life, Inc. is a not-for-profit organization organized to encourage among the general public an understanding of the dignity and worth of each individual human life, whatever its state or circumstance, and to foster respect for life before and after birth, particularly for the innocent, the incompetent, the impaired and the impoverished. To these ends, the organization promotes and engages in educational activities, and makes available, on a *pro bono* basis, its services and expertise.

PHYSICIANS FOR LIFE, INC.

The objectives of Physicians for Life, Inc., a not-for-profit organization, is to uphold the sanctity and dignity of human life at all stages of development, and to reaffirm the unique value and worth of every human life in all situations of health or ill-health, and at any age. Physicians for Life sponsors research and educational programs that promote respect for life, develops programs to assist pregnant mothers, their unborn children and their families, and aids those experiencing crisis, especially arising from situations of pregnancy or from death.

(27)

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Supreme Court of the United States

October Term, 1993

NATIONAL ORGANIZATION FOR WOMEN, *et al.*,

Petitioners,

v.

JOSEPH SCHEIDLER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF FOCUS ON THE FAMILY AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS JOSEPH SCHEIDLER, *et al.*

Of Counsel:
Stephen W. Reed*
REED & BROWN
200 East Del Mar Boulevard, Suite 250
Pasadena, California 91105-2544
818/449-7452

Carmen K. Bullard
Theresa Schrempp
600 First Avenue, Suite 635
Seattle, Washington 98104
206/624-2531

Ronald E. McKinstry
ELLIS LI & MCKINSTRY
999 Third Avenue, Suite 3700
Seattle, Washington 98104
206/682-0565

*Counsel of Record

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I. INTEREST OF AMICUS CURIAE

This brief supporting the Respondents is filed, with the consent of the parties, on behalf of Focus on the Family. Focus on the Family is a Christian nonprofit corporation committed to promoting Judeo-Christian values through proclamation of the gospel of Jesus Christ and the strengthening of the emotional, psychological and spiritual health of families in the United States and throughout the world. It promotes discussion of issues which relate to its mission through its radio program heard by more than one million people daily over fourteen hundred stations and through its monthly magazines circulated to over two million people.

Focus on the Family is concerned over restrictions on the freedom of speech and assembly and is, therefore, concerned by the attack on such freedoms posed by the position of Petitioners.

This case is of special importance to the *amicus* because a result in favor of the Petitioners would limit a citizen's right to participate in "public-issue picketing" and cause excessive chilling of such activities. The attempt today to limit the First Amendment rights of free speech and assembly against unpopular abortion clinic demonstrators will be used tomorrow to silence other selected political activists.

SUMMARY OF ARGUMENT

The Petitioners' arguments rely on an interpretation of the Racketeering Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, which expands it to cover activities that are not financially motivated either in the enterprise or in the predicate act. This expansion is not supported by the clear language of the statute as held by three of the four circuits that have addressed this issue. The Petitioners' theory of recovery rests solely on a definition of Hobbs Act extortion that is contrary to the plain language of 18 U.S.C. § 1951. Petitioners' position is inconsistent with established case law, is incompatible with the principle of lenity, and is contrary to common law. Petitioners' interpretation wholly disregards the requirement that a defendant "obtain" property in order to commit the crime of extortion. Finally, Petitioners' interpretation of the RICO statute and the Hobbs Act is incompatible with First Amendment rights of free speech and assembly.

I. The Hobbs Act Does Not Apply To Activities In Which Neither The Defendant Nor A Related Third Party "Obtain" Property.

Liability under the Hobbs Act requires that the defendant or a related third party wrongfully "obtain" property from another. In interpreting this statute, the Court must look at the elements of the

traditional common law offense of extortion and the statutory and interpretive case law, all of which provide that "obtaining" property is a required element of this crime.

A. *The Plain Meaning Of The Word "Obtain" In The Hobbs Act Demands The Acquiring Of Property.*

Extortion is defined in 18 U.S.C. § 1951(b)(2) as the "obtaining" of property from another.[1] The fundamental rule of statutory interpretation requires that words be given their ordinary meaning. *Russello v. United States*, 464 U.S. 16, 21 (1983). The ordinary meaning of "obtain" is "to get a hold of by effort"[2] and "to come into possession or enjoyment of (something) by one's own effort, or by request[.]"[3] The plain meaning of the Hobbs Act does not extend to instances in which neither the defendant nor a related third party acquired something, regardless of whether the plaintiff parted with or gave up something.

Where there is no ambiguity in the words chosen by the legislature, there is no room for construction. *Yates v. United States*, 354 U.S. 298, 305 (1956)(citing *United States v. Wiltberger*, 5 Wheat. 76, 95-96 (1820). Moreover, in interpreting a criminal statute, all language must be strictly construed with any ambiguity resolved in favor of lenity. *United States v. O'Grady*, 742 F.2d 682, 694 (1984)

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[1] Section 1951(b)(2) defines extortion as:

> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. (emphasis added)

[2] Black's Law Dictionary defines "obtain" as: "To get hold of by effort; to get possession of; to procure; to acquire, in any way." BLACK'S LAW DICTIONARY 1078 (6th ed. 1990).

[3] The Oxford English Dictionary defines "obtain" as: "To come into the possession or enjoyment of (something) by one's own effort, or by request; ... hence, generally, to acquire, get." OXFORD ENGLISH DICTIONARY Vol. 10, 669-670 (2nd ed. 1989).

(citing *United States v. Enmons*, 410 U.S. 396, 411 (1973)(citations omitted); *cf. United States v. Chestnut*, 394 F. Supp. 581, 591 (S.D.N.Y. 1975)(narrow construction of criminal statute meets "least drastic means" test), *aff'd*, 533 F.2d 40 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976).

B. *Common Law Extortion Required That The Defendant Obtain Property.*

At common law "extortion" was an acquisitive crime requiring a taking of property to complete the offense. Since 1285, extortion has required such a taking.[4] The requirement that the extortionist "obtain" or "receive" were necessary elements of the crime throughout history.[5]

Although the scope of the common law offense was generally expanded by statute to include wrongful obtaining of property by a private person through a wrongful threat to do injury, it nevertheless continued to require an "obtaining." Comment, Griep, *A Study of Statutory Blackmail and Extortion in the Several States*, 44 Mich. L. Rev. 461 (1945).

C. *The Legislative History Of The Hobbs Act Dictates The Necessity For The Element Of "Obtain."*

Congress enacted the Hobbs Act recapitulating the common law offense of "extortion." All federal statutes that recapitulate traditional offenses are to be read as incorporating the historical elements of those offenses. *Morissette v. United States*, 342 U.S. 246

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[4] Westminster I, 3 Edw. c 26, 27, 28, 30, 31, Westminster II, c 13 Edw. (1285).

[5] 11 Hen. 7, ch. 23 (1494)("**receive** ... by Color of their Office"); 33 Hen. 8, ch. 39 (1541)("**receive** or take")("**receive** and take"); 2 & 3 Edw. 6, ch. 6 (1548)("exact, **receive** or take"); 4 & 5 Phil. & M., ch. 3 (1557)("exact, levy, **receive** or take") 21 Hen. 77, ch. 6 (1529)("take, **receive** or demand"); 23 Hen. 8, ch. 9 (1531)("ask, demand, take or **receive**"); 27 Eliz. ch. 6 (1585)("**receive**, take or have"); 27 Eliz. ch. 6, § 2 (1589)("have, **receive** or take"); 2 Jac., ch. 5 (1604)("take, **receive** or make benefit to his own use")(emphasis added)

(1952);[6] *United States v. Bailey*, 444 U.S. 394 (1980).[7] Accordingly, Hobbs Act extortion, like extortion at common law, is an acquisitive crime that requires a taking.

Congress, in enacting the Hobbs Act, took its relevant language from the New York Field Code.[8] Since Congress enacted the Hobbs Act based on New York law, the settled interpretation of extortion law in New York jurisprudence is as much a part of the Hobbs Act as if Congress itself directly enacted it. *Willis v. Eastern Trust and Banking Co.*, 169 U.S. 295, 307-308 (1887). Accordingly, in interpreting the Hobbs Act, the New York Field Code and cases construing it control.

Under New York law, the question of whether or not an extortion occurred turned on whether or not the defendant intended to receive or procure money. Other motivations did not suffice. In the Commentary to Chapter IV, Section 584 (Larceny), the Field Code Commissioners appropriately observed:

> Four of the crimes affecting property require to be somewhat carefully distinguished; robbery, larceny, extortion and embezzlement. The leading distinctions between these, in the view taken by the commissioners may be briefly stated thus: All four include the criminal acquisition of the property of another.

[6] In *Morissette v. United States*, 342 U.S. 246 (1952), the court held that even when the statute did not state a *mens rea* for the crime, the *mens rea* for larceny was applied because such an element was required under pre-existing common law.

[7] This court noted in *United States v. Bailey*, 444 U.S. 394, 415 n. 11 (1980), "that Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law ... and that therefore [common law concepts] may have been contemplated by Congress [when criminal statutes are enacted]." It further held that "the Anglo-Saxon tradition of criminal justice, [is] embodied in the United States Constitution and in federal statutes ...." *Id.* at 414.

[8] 89 Cong. Rec. 3227 (1943)(Statement of Hobbs)("There are two definitions [extortion and robbery] set forth in the bill, both of which are based on the New York law." *See also*, 91 Cong. Rec. 11,906 (1945) (Statements of Hobbs and Robison). The New York Field Code defines extortion as: "Extortion is the obtaining of property from another, with his consent, induced by wrongful use of force or fear, or under color of official right." New York Penal Code § 613, Ch. 6 (1865).

New York Field Code, Ch. 4, § 584 (emphasis added). In *People v. Ryan*, 232 N.Y. 234, 133 N.E. 572, 573 (1921), a prosecution for blackmail, (one element of which was "the intent ... to extort or gain any money or other property") the court held that a threat to injure a business without an accompanying intent to "gain money or property" did not fall within the statute.[9] *See also, People v. Squillante*, 18 Misc.2d 516, 564, 185 N.Y.S.2d 357, 361 (1959)(In an extortion prosecution the court held that "'obtaining of property from another' imports not only that he give up something but that the obtainer receive something").

The Hobbs Act and case law indicates no intent to depart from the common law requirement that property be "obtained." Congress' use of the term "obtaining" clearly demonstrates an affirmation of the requirement of gain by the defendant and an intent to punish only criminal activities, which are motivated by profit or gain. The "obtaining" requirement can only be met if the defendant or a related third party or entity acquires the property of the owner. *United States v. Green*, 350 U.S. 415, 418-420 (1955). Until the unprecedented decision in *Northeast Women's Center v. McMonagle*, 868 F.2d 1342 (3rd Cir. 1989), *cert. denied*, 493 U.S. 901 (1989), no court had held that extortion occurs when neither the defendant nor a related third party receives a benefit.[10]

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[9] In discussing the elements of the crime, the Court noted: "If it were simply the foolish act of an elderly woman, moved by anger, spite or revenge, without any intent to procure or extort money, there would be no crime of blackmail." *People v. Ryan*, 133 N.E. 572, 573 (1921).

[10] The three cases cited by the lower court, in footnote 17, do not support the court's contention that the Hobbs Act does not require an economic motive. In *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 101-192 (2nd Cir. 1990), the court in *dicta* quotes *United States v. Clemente*, 640 F.2d 1069, 1079-80 (2nd Cir. 1981), in which there was an obtaining, not by the defendant himself, but by related third parties -- hardly the situation in the instant case. In *United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983), the obtaining element was not squarely raised. In *United States v. Starks*, 515 F.2d 112 (3rd Cir. 1975), the religious organization in fact "obtained" property, and the court held, not surprisingly, that the mere fact that the defendant was obtaining funds on behalf of a religious organization did not insulate him from liability under the Hobbs Act.

This Court has previously refused to apply the Hobbs Act even to violent activities occurring during a labor strike for higher wages, because such activity does not squarely meet the requirements of the Hobbs Act. *United States v. Enmons*, 410 U.S. 396, 411 (1973).

It is undeniable that Congress intended to limit the application of this criminal statute only to those who wrongfully seek to gain property from another. The actions of the respondents simply do not meet that criterion.

The Respondents in this action were not business competitors of the clinic or its employees. They stood to gain nothing by the diminution of the clinic's business, nor do the Petitioners even allege that any related third party benefited because of the actions of the Respondents. As such, the crime of "extortion" is not relevant to their conduct. Whatever else they might have been — no matter how much one may agree or disagree with their actions — they are not extortionists.

II. Liability Under RICO Can Only Be Imposed When A RICO Enterprise Or Its Predicate Act Is Economically Motivated.

RICO was enacted to "seek the eradication of organized crime in the United States by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[11] Obviously the government has an interest and a right to restrain felons. Congress fully intended RICO to reach traditional organized crime. Although RICO has incidentally stretched beyond organized crime, such an incidental use was limited by the requirement of economic motivation.[12] This Court has refused to expand the Hobbs Act to

[11] *See*, Senate Comm. of the Judiciary, Organized Crime Control Act of 1969, S. Rep. No. 617, 91st Conf., 1st Sess (1969).

[12] Congress had to define organized crime indirectly: functionally by what people did, not by who they were. The functional definition brought in, secondarily, people who were not members of organized crime but who engaged in activities characteristic of organized crime. *See*, A.B.A. Section of Corp. Banking & Business Law, Report of the Ad Hoc civil RICO Task Force 88 (1985) at 90.

political demonstrations or picketing operations or make violators of minor state offenses[13] subject to federal felony charges. *United States v. Enmons*, 410 U.S. 396, 411 (1973). Certainly this Court should not now penalize political activity under RICO.

In *United States v. Turkette*, 452 U.S. 576 (1981), this Court held that RICO applied to any organization, legitimate or not, whose activities generate monies, so as to serve as a "spring board into the sphere of legitimate enterprise." *Id.* at 591. Either the predicate acts or the enterprise, however, must have some financial motive. Three of the four circuits that have addressed this issue agree. *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir. 1985); *United States v. Ivic*, 700 F.2d 51, 65 (2d Cir. 1983); *see also, United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988); *United States v. Darryl Freeman, Tyrone Netters*, Nos. 92-10094, 92-10102 (9th Cir. Sept. 22, 1993)(LEXIS, 1993 U. S. App. 24255); *cf. Northeast Women's Center v. McMonagle*, 868 F.2d 1342, 1349-50 (3d Cir.) *cert. denied*, 493 U.S. 901 (1989).

The Second Circuit specifically discussed the term "enterprise" in *Ivic*, and concluded that the term "enterprise" in subsections (a) and (b) of 18 U.S.C. § 1962 clearly refers to the sort of entity that one joins to make money. *Ivic* at 65.[14] The Second Circuit's analysis adhered to the rule that when the same word is used in the same section of an act more than once, and the meaning is clear in one place, it will

[13] Charges such as those discussed in Petitioners' brief, i.e. trespass, blocking, disorderly conduct charges in *Enmons* were significantly more serious.

[14] (a) It shall be unlawful for any person who has **received any income** derived, directly or indirectly, from a pattern of racketeering activity, or through collection of an unlawful debt in which such person has participated as a principle within the meaning of section 2, title 18, United States Code, **to use or invest, directly or indirectly, any part of such income, or the proceeds of such income**, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.... 18 U.S.C. § 1962(a)(relevant portion)

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. 18 U.S.C. § 1962(b)

be assumed to have the same meaning in the other place. *Id.* Under subsection (a) a person can only be liable if he or she has "**received** any income derived, directly or indirectly from a pattern of racketeering activity, or through a collection of an unlawful debt ..." 18 U.S.C. § 1962(a)(relevant portion). Thus, as with the Hobbs Act, RICO requires that a defendant **receive ("obtain")** something of a financial benefit.

Similarly, under subsection (b) only a person who **acquires** an interest in an enterprise through a pattern of racketeering can be held liable. Again, like the Hobbs Act, RICO requires that a person **acquire ("obtain")** something if liability is to be imposed. 18 U.S.C. § 1962(b). Under either of these sections no liability can be imposed without the Court first finding an economic benefit to the defendant. Accordingly, it must be inferred that where an economic motivation is required under subsections (a) and (b) economic motivation must be required under (c) and (d) as well. That is particularly true since all subsections are set forth within the same section of the statute, 18 U.S.C. § 1962, and all utilize the term: "enterprise". There is no indication that Congress intended the term "enterprise" to mean something different in subsection (c). In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1984), this Court stated that "we should not lightly infer that Congress intended [terms] to have wholly different meanings in neighboring subsections." *Id.* at 489.

For this Court to interpret subsection (c) differently from subsections (a) and (b) and not require an economic motivating factor would expand the statute beyond that intended by the legislature.[15]

Most recently in *United States v. Darryl Freeman, Tyrone Netters*, Nos. 92-10094, 92-10102 (9th Cir. Sept. 22, 1993)(LEXIS, 1993 U. S. App. 24255), the 9th Circuit Court of Appeals held that either an economic motive in the enterprise or in the predicate act was sufficient to uphold a conviction under RICO.[16]

[15] *See, Yates v. United States*, 354 U.S. 198 (1956) and argument, *supra*.

[16] The defendant Netters argued that neither the enterprise (49th Assembly District) nor the predicate act (bribery crimes) were economically motivated. However,

Implicit in the decision is the notion that economic motivation in either the enterprise or the predicate act is *sine qua non* for RICO liability. Without one or the other, there can be no liability. Further as held in *Ivic, supra, Flynn, supra, Ferguson, supra,* and *Netters, supra,* it is only critical that either the enterprise or the predicate act be economically motivated. Thus the enterprise itself need not be economically motivated as long as the predicate acts are economically motivated. This requirement is even more apparent when the predicate act is an acquisitive crime, i.e. bribery or extortion.

If the Hobbs Act is properly interpreted as an acquisitive crime, it is unquestionably economically motivated. However, even if Hobbs is interpreted as the Petitioners request, and ruled no longer an acquisitive crime, economic motivation must still be found in the enterprise itself.

III. Application Of The Hobbs Act And RICO To Non-Economically Motivated Political Activity Is Incompatible With The First Amendment.

Even though Petitioners allege violent conduct, which is clearly not protected by the First Amendment, the Court should not impose liability under the RICO Act since its scope is not limited to actions that are necessarily violent. If this Court declines to find the statutory necessity for an economic motivation, it will create widespread abuse of RICO claims against First Amendment protesters.

RICO has become the "weapon of choice" for private litigators to chill First Amendment rights.[17] The potential effect of applying

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the court held that although the enterprise may not have been economically motivated, it was clear that the state law bribery crimes were economically motivated. *United States v. Darryl Freeman, Tyrone Netters,* Nos. 92-10094, 91-10102 (9th Cir. Sept. 22, 1993)(LEXIS, [*34-35] 1993 U.S. App. 24255).

[17] "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit ....[C]ivil RICO has been used for extorsive purposes, giving rise to the very evils that it was designed to combat." Califa, *RICO Threatens Civil Liberties,* 43 Vand. L. Rev. 805, 834 (1990).

RICO to political activities with no economic motivation is enormous. "Public-issue picketing" occupies the highest rung in the hierarchy of values protected by the First Amendment. *Carey v. Brown*, 447 U.S. 455, 467 (1980). It is to protect this all-important value in our culture that courts have developed the doctrine of the "chilling effect." This doctrine reflects our preference for errors made in favor of free speech.[18]

A. *First Amendment Rights Allow Great Freedom And Must Not Be Chilled.*

A function of speech is to invite dispute and confrontation. It may serve its highest purpose when it induces a condition of unrest, or creates a situation of unrest, or even when it "stirs people to anger." *Cox v. Louisiana*, 379 U.S. 536, 551-552 (1965).

> Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech ... is ... protected against censorship or punishment .... There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Id. at 522 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949). Justice Brennan referred to these freedoms as "delicate and vulnerable." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

This Court has previously exercised extreme caution in imposing criminal sanctions for activities occurring within the range of legitimate political protest:

> In *Scales*, the Court held that protection for the innocent could be adequately accomplished by requiring that the defendants' specific illegal intent be proved to the degree demanded in *Noto v. United States*, 1961, 367 U.S. 290, 81

[18] Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. Rev. 685 (1978).

> S.Ct. 1517, 6 L.Ed.2d 836. "[C]riminal intent ... must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Noto v. United States*, at 299-300, 891 S.Ct. at 1522. [footnote omitted] When the alleged agreement is both bifarious and political within the shadow of the First Amendment, we hold that an individuals specific intent to adhere to the illegal portions may be shown in one of three ways: by the individual defendant's prior or subsequent unambiguous statements; by the individual defendant's subsequent commission of the very illegal act contemplated by the agreement; or by the individual defendant's subsequent legal act if that act is "clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated." *Scales v. United States*, 367 U.S. at 234, 81 S. Ct. at 1488.

United States v. Spock, 416 F.2d 165, 172-173 (1st Cir. 1969).

In interpreting and applying statutes to First Amendment activities, such statutes can be applied only if they can be "narrowly tailored" to avoid infringement on First Amendment rights. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). The court in *Claiborne* reversed the lower court's judgment against defendants, setting forth the constitutional standards:

> The First Amendment does not protect violence .... No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, **however, 'precision of regulation' is demanded.** *NAACP v. Button*, 371 U.S. 415, 438. **Specifically, the presence of activity protected by First Amendment imposes restraints on the grounds that may give rise to damage liability and to the persons who may be held accountable for those damages."**

Claiborne, 458 U.S. at 916-917 (emphasis added). Thus, boycotts, picketing, demonstrations and other forms of free speech, petition, assembly and association may be coercive and intimidating without losing First Amendment protection. The fact that the object of the protest sustains a loss or deprivation does not entitle it to deny First Amendment protection for such protest. *NAACP v. Claiborne, supra.*

B. *This Court Must Construe RICO And The Hobbs Act In A Manner Providing First Amendment Protection.*

It is a fundamental principle of statutory interpretation that statutes be construed in order to avoid punishing activities that are protected by the First Amendment. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1971). This Court not only has a duty to look at this challenge to the statute's application, but has a duty to look at the statute's overall application.[19]

Under the Petitioners' application of RICO to an expanded definition of Hobbs Act extortion, all manner of political protest which results in economic loss to the object of the protest is subject to the threat of criminal prosecution and/or the extraordinary civil penalties imposed under RICO. If this Court dispenses with the requirement that the defendant "obtain" property, it will have fashioned a formula whereby any illegal or unprotected activity, regardless of how minor, is extortionate, due to the fact that it occurred in the context of a protest which was, almost as a matter of definition, coercive, intimidating or fear-provoking. *Cox v. Louisiana*, *supra*. While Petitioners imply that RICO liability, based on asserted predicate acts of extortion, will be limited to certain undefined "violent"

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[19] In *Bigelow v. Virginia*, 421 U.S. 809, 815-816 (1975), the court in a claim by Bigelow that his First Amendment rights were violated held that even though Bigelow may not have had his own activity shown to be constitutionally privileged, nevertheless the court would not hesitate "to take into account possible application of the statute in other factual contexts besides that at bar." *Id.* at 816. *See also, NAACP v. Button*, 371 U.S. 415 1963); *United States v. Stansell*, 847 F.2d 609 (9th Cir. 1988).

acts, they cite no statutory basis for such limitation, because, o course, no such limitation exists.[20]

Such an interpretation would have a profoundly chilling impact on all manner of political protest and particularly on any act o civil disobedience.

The *amici* brief of the NOW Legal Defense and Education Fund and others, notes that "traditional" forms of civil disobedienc include such minor criminal conduct as trespass, disorderly conduct and blocking traffic. Such actions, of course, are not constitutionally protected. Yet, under Petitioners' interpretation, any of these actions (blocking, trespass, disorderly conduct) particularly when engaged in by dozens or hundreds of participants would often induce "fear," and would therefore be susceptible to a criminal charge or civil claim of Hobbs Act extortion.

Undoubtedly, under this expanded definition of "extortion" those expressing unpopular political opinions will be the hardest hit by prosecutors and plaintiffs alike, who, as the *amici* suggest, will attempt to distinguish politically correct civil disobedience (civil rights, suffrage, gay/lesbian rights) from politically incorrect civil disobedience (pro-life among others) on the basis of an undefined and factually unsupported "violence" criterion which is nowhere to be found either in the Hobbs Act or in the RICO statute.

If the Court dispenses with the "obtaining of property" requirement, whether or not a protester extorts by engaging in "wrongful use of actual or threatened force, violence or fear" becomes a

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[20] The RICO statute can and has been used against pro-life protesters who engage in peaceful civil disobedience, on the basis of an extortion theory. In *Feminist Women's Health Center v. Roberts, et al.*, W. D. Wa. 86-161-Z (1990)(*petition for review pending* 9th Cir. Nos. 90-35266 and 90-35298)(1993), one of the defendants, Sharon Codispoti, faced an extortion claim after she and one other person sat on the steps of a clinic occupied by several businesses, including the clinic, without impeding anyone. No violence, force, injury, or threat of injury by Codispoti was claimed. "Conspiracy" was apparently inferred because she attended a meeting regarding the protest.

factual question for a jury. Does anyone doubt that an Alabama jury would have found that the actions of Dr. King and others in engaging in sit-ins on private property constituted "use of ... fear" against business owners and white customers resulting in losses to the targeted businesses? Consider, for example, the holding of the state court, largely based on a finding of "atmosphere of fear," which this court reversed in *NAACP v. Claiborne*. Surely many civil rights protesters would have declined to engage in sit-ins had they been faced with criminal and civil claims of racketeering!

The threat to First Amendment protection is exacerbated by the fact that political speech often occurs in concert with others. Indeed, Freedom of Assembly is explicitly protected by the First Amendment. Since some elements of intimidation or fear are arguably present whenever numerous individuals choose to protest together, by the Petitioners' formulation, extortion can be asserted, under vicarious liability theories of conspiracy or aiding and abetting, if any illegal or unprotected activity occurs during such a demonstration. If the existence of a conspiracy may be inferred from the facts,[21] as is often the case, such facts can only be determined by a jury or trier of fact; therefore, a wholly innocent picketer, sued or criminally charged as a RICO co-conspirator, may find it impossible to secure a dismissal short of trial.

Shockingly, under Petitioners' proposed interpretation of RICO and the Hobbs Act, political protesters who engage in otherwise minor illegal conduct will be dealt with much more harshly, as extortionists and racketeers, than defendants who engage in the same conduct (i.e., trespass, disorderly conduct and destruction of property) for non-political reasons, or for no reason. The political protester's punishment is enhanced because he/she is motivated by a desire to bring about a change in the practices of another. Such a result constitutes a "deprivation" sufficient to support an extortion claim under Petitioners' expansive definition of the meaning of Hobbs Act

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[21] *Iannelli v. United States*, 420 U.S. 770, 777, n. 10 (1975).

"obtaining". Thus, any illegal activity, however minor, is automatically extortionate and thus felonious, because it occurs in the context of political persuasion. Such an interpretation of criminal statutes is completely antithetical to the fundamental constitutional principle which holds that illegal activity, in the context of political speech must be subjected to the "strictest law". *NAACP v. Claiborne Hardware*, 458 U.S. 886, 919, 102 S.Ct. 3409, 3429 (1982)(citing *Noto v. United States*, 367 U.S. 290, 299 (1960).

Without a doubt, political protesters will be dissuaded from expressing their views on abortion or any other issue, so long as they face the specter of severe criminal and/or civil liability under the Hobbs Act or RICO. Such an application of the RICO statute is wholly improper and unconstitutional.

CONCLUSION

We urge that this court rule (1) that the Hobbs Act requires the element of "obtaining" and be affirmed as an acquisitive crime and, (2) and in any event, that either the enterprise or the predicate act under RICO require economic motivation. We urge this Court to frame its ruling carefully so as to prevent any abusive use of RICO claims to chill nonviolent exercise of First Amendment rights.

Respectfully submitted,

Of Counsel:
Stephen W. Reed*
REED & BROWN
200 East Del Mar Boulevard, Suite 250
Pasadena, California 91105-2544

Carmen K. Bullard
Theresa Schrempp
600 First Avenue, Suite 635
Seattle, Washington 98104

Ronald E. McKinstry
ELLIS LI & MCKINSTRY
999 Third Avenue, Suite 3700
Seattle, Washington 98104

**Counsel of Record*

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Supreme Court Of The United States

October Term, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Petitioners,

v.

JOSEPH SCHEIDLER, *et. al.*,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF FOR THE SOUTHERN CENTER FOR LAW & ETHICS, CENTER FOR LAW AND RELIGIOUS FREEDOM, AND J. SCOTT HOUSER, AMICI CURIAE IN SUPPORT OF RESPONDENTS

Steven T. McFarland
Bradley F. Jacob
Center for Law and
Religious Freedom
Christian Legal Society
4208 Evergreen Lane
Suite 222
Annandale, Virginia 22003
703-642-1070

ALBERT L. JORDAN*
Wallace, Jordan, Ratliff, Byers
& Brandt
2000A SouthBridge Parkway
Birmingham, Alabama
205-870-0555

David Smolin
Professor of Law
Cumberland School of Law
Samford University
Birmingham, Alabama 35229

**Counsel of Record*

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INTEREST OF AMICI CURIAE

Amici Curiae share a common interest in the rights of free expression, including religiously-motivated expression, in areas of public concern, including (but not limited to) abortion. The Southern Center for Law & Ethics, a non-profit, publicly-funded tax exempt corporation, has previously submitted to this Court two *amicus curiae* briefs focusing on anti-

abortion civil disobedience. *See Amicus Curiae* briefs submitted in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753 (1993). The Center for Law and Religious Freedom, the legal advocacy and information arm of the Christian Legal Society, has advocated extensively in this and other courts for the protection of religious speech and exercise. J. Scott Houser is an ordained minister who has been subject to RICO litigation in large part due to religiously-motivated speech, and who has witnessed the chilling effect of RICO litigation upon others. These *amici curiae* are described more fully in the Appendix. Counsel for all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Petitioners would have this Court use its authority to provide a legal mechanism to crush a social protest movement which continues to question the legitimacy of one of this Court's seminal decisions. If this Court were to permit the use of RICO against anti-abortion protesters, such holding necessarily would threaten other social protest movements, such as the environmental and animal rights movements, which also oppose the profit-making activities of particular industries. The structure of RICO's prohibitions makes it unlikely that such a threat to social protest movements was intended by Congress. The holding below should be upheld because the circuit court's interpretation of RICO avoids serious constitutional issues that would be raised if RICO were found applicable to social protest expression and activity not intended to obtain personal economic gain from the victim.

This Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), demonstrates that the First Amendment protects social protest movements and associations, even where such movements are marred by threatening speech and violent incidents. While the First Amendment does not protect actual violent acts against the person, the First Amendment necessarily limits which sorts of speech, association, and expressive conduct may be made illegal, and pro-

tects even threats of violence in the context of overcharged political rhetoric. *See also Brandenburg v. Ohio*, 395 U.S. 444 (1969). Thus, the First Amendment, in combination with the due process requirement of specificity, limits the kind of civil or criminal claims that can arise from social protest activities, associations, and writings. *See also Simon & Schuster v. New York Crime Victim's Board*, 112 S.Ct. 501 (1991).

There are presently adequate state and federal remedies for conspiracies and associations intended to accomplish acts of actual violence. *See, e.g.*, 18 U.S.C. §§ 2, 371, 844(i). If Congress wishes to widen the scope of liability for social protest movements, it should do so directly and with precision, and not in a way that passes responsibility to this Court to broadly construe and apply an existing statute addressing unrelated concerns.

ARGUMENT

The abortion-related context of the present case may distract the Court from the broader issues at stake. The present case involves the applicability of RICO to anti-abortion social activism. This Court is to some degree the source and target of such activism, having fueled the anti-abortion movement by its decision in *Roe v. Wade*, 410 U.S. 113 (1973). *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. Rev. 375, 376, 379-82 (1985).[1] More recently, this Court in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), relied upon the increasingly intense "pressure to overrule" *Roe* as a reason to affirm it, *see* 112 S.Ct. at 2816, and called upon the anti-abortion move-

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[1] "*Roe v. Wade*... has occasioned searing criticism of the Court, over a decade of demonstrations, a stream of vituperative mail addressed to Justice Blackmun ... annual proposals for overruling *Roe* by constitutional amendment, and a variety of measures in Congress and state legislatures to contain or curtail the decision. ... The sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures." 63 N.C.L. Rev. at 379, 381 (footnote numbers omitted).

ment to cease its opposition to legalized abortion. See 112 S.Ct. at 2815 (*Roe* and *Casey* call for end of national division through acceptance of common mandate rooted in Constitution).

Petitioners would have this Court use its authority to provide a legal mechanism to crush a social protest movement which continues to question the legitimacy of one of this Court's seminal decisions. We propose tolerance here, not only for respondents, but also for the participants in other social protest movements.

I. This Court's Precedents Imply That Personal Economic Gain Arising From Racketeering Activity Is Needed To State A Claim Under RICO's Section 1962(c).

The relevant portion of RICO, 18 U.S.C. § 1962(c), makes it illegal for "any person ... associated with any enterprise ..., to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity...." In this case, a fundamental issue is whether the alleged involvement of the Defendants in a series of alleged acts of racketeering against abortion facilities enables them to conduct a distinct association known as an "enterprise." We think not, principally because neither the association nor the racketeering is connected sufficiently to the personal economic gain of the Defendants.

There is little dispute that RICO was a result of concerns by Congress with "the economic power of organized crime derived from its huge illegal profits." *Russello v. United States*, 464 U.S. 16, 29 (1983). To do so, RICO provided explicitly for criminal and civil penalties as well as forfeiture of interests in an "enterprise." Such forfeitures protected legitimate business from infiltration with the proceeds of racketeering activity. *See id.* citing *United States v. Turkette*, 452 U.S. 576, 591 (1981) ("The broader goal was to remove the profit from organized crime by separating the racketeer from *his* dishonest gains.") (emphasis added).

Similarly, there is little debate over whether Defendants possess the economic power of the organized crime that in-

spired RICO and over whether the Defendants' association was formed to enrich them materially. None of the behavior alleged in the Second Amended Complaint, as ugly as it may appear to be, even implies that Defendants are seeking personal economic gain.

The only economic gain of the Defendants alleged in the Complaint results from the independent, unpredictable acts of third parties. It is not, in any cognizable legal sense, the result of racketeering. It is at least as much the result of media activity. As noted by the Seventh Circuit in its decision to dismiss this portion of the Complaint, viewed most favorably to the Plaintiffs,

> The cause and effect claim ... is something like this: defendants invade health centers, destroying property and injuring center staff; media covers event; potential contributors see media coverage and are favorably impressed; contributor sends donation; defendants receive income.

968 F.2d at 625.

There is not the first hint in the text of RICO that an "enterprise" is something that results from media coverage, or from the voluntary contributions of third parties to persons who are otherwise criminals. There are simply too many possible causes of contributions, separate and distinct from any admiration for racketeering against abortion facilities, to enable this Court to credit an allegation that Defendants' misconduct amounts to "participation" in an "enterprise."

This Court's "continuity" requirement, used to identify the "pattern of racketeering activity" described in Section 1962(c), further implies that no enterprise is conducted by the racketeering itself. In order to engage in a "pattern of racketeering activity," relatedness is not enough. "[I]t must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity." *H.J., Inc., v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240 (1989) (emphasis in original). Absent a direct relation to economic enrichment arising out of the criminal misconduct, there is not a sufficient threat of con-

tinuing activity to imply control of an "enterprise" thereby. In other words, absent personal economic enrichment or enrichment of the enterprise *from* racketeering, the criminal does not "participate" in the "enterprise *through* a pattern." He cannot afford to.

Absent other evidence of personal economic gain from the "pattern" itself, even the announced intention to continue criminal behavior against abortion facilities should fail to violate Section 1362(c). Public debate on the subject of abortion is so intense that a public expression of an intention to stop abortion is hardly evidence of the "continuity" needed to conduct a RICO "enterprise."

In sum, the pattern of racketeering activity needed to conduct an enterprise under Section 1962(c) is absent where there is no allegation of personal economic gain.

A. The structure of RICO's prohibitions makes it likely that the economic gain alleged here is not intended by Congress to be within the ambit of the statute.

Section 1962(c) is the third of four prohibition subparagraphs. The first two relate "enterprise" to a "pattern of racketeering activity" in explicitly economic terms. Thus, subparagraph (a) makes it unlawful to "invest" or "use" the proceeds of racketeering in an enterprise. Subparagraph (b) bars the acquisition of "any interest" in an enterprise through racketeering. The ordinary meaning of these terms refers to property, an economic concept. *See Russello v. United States*, 464 U.S. 16, 21 (1983) (defining "interest").

Moreover, these economic concepts refer to the proceeds of racketeering activity. *See Russello v. United States*, 464 U.S. at 21. These subparagraphs plainly imply that an "enterprise" is an activity involving money available for distribution to participants. The "racketeering activity" listed in 18 U.S.C. § 1961 also generally constitutes crimes that themselves create money.

Subparagraph (c) seems to go another step beyond (a) and (b), although nothing in the text suggests an intent to

abandon the economic motive implicit in the enterprise. It reaches persons "employed by or associated with any enterprise" or who "participate ... in the conduct of the enterprise's affairs through" racketeering.

B. Petitioners underlying alleged RICO predicate offense — extortion — is not the kind which is actionable when there is economic gain derived from unrelated third party contributors.

Even if RICO could be construed to reach as far as Petitioners propose, the underlying racketeering offense in this case — extortion[2] — is not likely to be the kind of RICO offense that does generate economic gain for the defendant. Extortion *itself* must create personal economic gain for the wrongdoer. It is not enough that someone else may contribute voluntarily to the wrongdoer. As Justice Stevens wrote, in noting common ground for this Court in a recent case construing the extortion statute:

> [I]t is essential that the payment in question be contingent on a mutual understanding that the motivation for the payment is the payer's desire to avoid a specific threatened harm or to obtain a promised benefit that the defendant has the apparent power to deliver....

McCormick v. United States, 111 S.Ct. 1807, 1821 (1991) (Stevens, J., dissenting) (distinguishing campaign contribution from storekeeper payment to thugs). In the context of illegal anti-abortion activity, there is no hint that the abortion clinic victims can achieve or have achieved relief by some understanding to provide property to the rescue organizers. As noted previously, any economic gains generated in connection with the extortion are the results of independent acts of third parties.

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[2] (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. 18 U.S.C. § 1951(b)(2).

In other words, Petitioner's Second Amended Complaint involves neither extortion, nor the proceeds from extortion flowing into an enterprise. For this reason, the Petitioners have not alleged facts that show employment or association with an enterprise *through* extortion. And similarly, they have not alleged employment or association through any defined racketeering activity.

In summary, the text of RICO was not likely intended to reach the type of misbehavior alleged in the Second Amended Complaint.

II. As A Principle Of Statutory Construction, The Term "Enterprise" Should Not Be Deemed To Reach Noncommercial Associations, Because It Would Raise Serious Doubt As To RICO's Constitutionality Under This Court's First Amendment, Overbreadth, and Vagueness Rulings.

Under this Court's previous First Amendment precedent, ordinary citizens do not risk "guilt by association" when they associate with those who advocate social or political change by unconventional or even unlawful means. Petitioners invite this Court to explode the constitutional and common-sense boundaries of RICO's "enterprises" and "associations", thereby leveling the First Amendment walls protecting all social protesters from the chilling winds of enforced orthodoxy.[3]

Amici urge this Court to decline this invitation, which would otherwise raise serious doubts as to the validity of RICO under any of three well-established doctrines. First, free speech protection extends to expression intended to in-

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[3]The fact that Plaintiffs seek a remedy in damages does not vitiate these concerns. This Court has long recognized in other contexts as well that such relief can be at odds with the aspirations embodied in the First Amendment, however distasteful the speech. *See Falwell v. Hustler Magazine, Inc.*, 485 U.S. 46 (1988) (reversing damage award). Plainly, well-intentioned rules of liability can be misused to punish people for their support of social protest, including civil disobedience. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964) (defamation law).

fluence and even coerce a change in the targeted conduct, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Moreover, First Amendment overbreadth doctrine prohibits punishment of speech about crime. *Simon & Schuster*, 112 S.Ct. 501 (1991). Finally, this Court's vagueness concerns with RICO[4] would become frightening reality, as ordinary citizens would not be able to foresee where a jury, bereft of standards, would draw the line between protected versus culpable "associations".

1. Offensive language or rhetoric designed to deter business patrons retains its First Amendment protection where it centers on a matter of public concern.

The *Claiborne Hardware* decision merits full discussion as a standard by which to measure Defendant's connection with any peripheral non-peaceful conduct. It involved a boycott that began at the First Baptist Church of Port Gibson, Mississippi in April 1966 where NAACP's field secretary Charles Evers advised a group of "assembled black people that any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." 458 U.S. at 900 n.28. Thereafter, in the next nine months, in ten incidents "an unlawful form of discipline was applied to certain boycott violators." *Id.* at 905.

The unlawful conduct included shots being fired into a home, bricks thrown through car windows, an NAACP member taking a bottle of whiskey from a black man who purchased it from a white-owned store, a fight involving theft of a gun, a public "spanking" of an elderly brick mason, slashing of tires, damage to a flower garden, and some threatening phone calls. *See id.* at 904-06. In addition, persons trading

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[4] At least four members of this Court have acknowledged vagueness concerns with RICO. *See H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring in the judgment) ("RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws").

with white merchants were called demeaning names, branded as "traitors" and socially ostracized. *Id.* at 904.

In April 1969, Evers again spoke at the First Baptist Church after a young black male had been killed by Port Gibson police. He threatened "discipline" of boycott violators. Two days later, Evers told several hundred people: "If we catch any of you going in any of them racist stores, we're going to break your damn neck." *Id.* at 902.

Suit was filed in October 1969, and in 1976, liability was found on three separate conspiracy theories: malicious interference with business, violating State antitrust statutes, and statutes against secondary boycotts. Damages were imposed against 130 defendants jointly and severally, including the national NAACP. An injunction was issued as well against "store watching," discouraging patronage of stores, especially by using demeaning or obscene language, and against picketing or patrolling any premises. *See id.* at 891-94.

The Mississippi Supreme Court upheld the judgment on interference with business grounds, and noted defendants had "agreed to use force, violence, and threats against the peace to effectuate the boycott." *Id.* at 895. The United States Supreme Court reversed, and criticized the State court for not making sufficiently precise findings.

The effort to cause economic damage to white merchants by boycott was deemed protected by the First Amendment:

> In sum, the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, "though not identical, are inseparable." *Thomas v. Collins, supra,* at 530, 65 S.Ct. at 322. Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change. Through speech, assembly, and petition — rather than through riot or revolution — petitioners sought change to social order that consistently treated them as second-class citizens.

Id. at 911-12. The boycott did not lose its protection despite efforts to "embarrass others or coerce them into action" by

reading their names at church meetings and publishing them in a newspaper.[5]

The difficult part of the case was in separating the damage caused by violent conduct from that caused by non-violent conduct. The Court stated its analysis by noting: "The First Amendment . . . restricts the ability of the State to impose liability on an *individual solely because of his association with another.*" *Id.* at 918 (emphasis added). "Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence." *Id.* at 920.

Among the issues of particular concern to the Court was the finding of liability against those with "[r]egular attendance and participation at the Tuesday meetings of the Claiborne Branch of the NAACP" at the First Baptist Church. *Id.* at 924, 897. The Mississippi Supreme Court did not sustain liability "on a theory that state law prohibited a nonviolent politically motivated boycott," but instead because of the violence surrounding the boycott. *Id.* at 915. And, with respect to those meetings, "there were statements saying you would be dealt with if found trading in boycotted stores," and suggestions that the Sheriff would be busy responding to calls of victims. *Id.* at 925 n.68.

Liability for this church attendance was impermissible "guilt *for* association." The Court wrote:

> [c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. The chancellor in this case made no finding that the individuals who committed those *acts of violence* were "agents" or "servants" of those who attended the NAACP meetings; certainly such a relationship cannot be found simply because both shared certain goals.

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[5] Moreover, because the boycotters were not themselves motivated by economic ends, State tort law power to regulate economic activity did not justify a finding of damage liability or injunctive relief. *See id.* at 914-15.

458 U.S. at 925, n.69. Thus, there was no evidence that "any illegal conduct was authorized, ratified, or even discussed at any of the meetings." *Id.* at 924.

As for the persons who enforced the boycott by watching stores, the same principle applied. "There is nothing unlawful in standing outside a store and recording names. Similarly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others." *Id.* at 926.

Even Evers, whose passionate rhetoric drew the participants in the boycott together, and who "threatened" groups meeting at the First Baptist Church, could not be held liable for business losses caused by his participation in the boycott. The Court remarked:

> While many of the comments in Evers' speeches might have contemplated "discipline" in the permissible form of social ostracism, it cannot be denied that references to the possibility that necks would be broken and to the fact that the Sheriff could not sleep with boycott violators at night implicitly conveyed a sterner message. In the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended.

Id. at 928. The Court held the judgment against Evers could not be sustained because "there is no evidence — apart from the speeches themselves — that Evers authorized, ratified, or directly threatened acts of violence." *Id.* at 929 (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1968)).

In sum, the First Amendment plainly limits Plaintiff's ability to claim that fear, intimidation, or coercion are illegitimate devices in a matter of great public concern:

> The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection.

> The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. *The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott.* A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless free-standing trees.

Id. at 933-34 (emphasis added). *Accord, Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 (1988) (explaining *Claiborne*).

Any potential deterrent effect on store customers from legitimate protest activity or the peripheral violence and threats is insufficient to justify liability. This Court rejected arguments that picketing and store watching, coupled with sporadic violent acts, were coercive:

> . . . The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. See *Schneider v. State, supra; Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). Petitioners were engaged openly and vigor-

> ously in making the public aware of respondent's . . . practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.

458 U.S. at 911 (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1972)).

If Petitioners' argument were correct, then the Constitution might not protect the NAACP from State tort or RICO claims by Mississippi merchants that the publicity of civil rights protests and violence injuring their businesses also contributed to NAACP's economic success. Surely, this is not correct.

Our democracy cannot afford to function in such a way. Its vibrancy depends on protection for organizations that wish to operate lawfully but challenge the legitimacy of popular institutions and conventions. As Justice Brennan urged in reviewing a statute prohibiting advocacy of violent overthrow of the government by persons who believe there should be no private property, such activity needs to be protected, not chilled. What was true then for the university, should also be true for direct citizen participation in matters of public concern through association with organized social protest movements.

> No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.
>
> ***
>
> We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405; "[f]or standards of permissible statu-

> tory vagueness are strict in the area of free expression. * * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967).

Congress should not be deemed to have endorsed in RICO a chill on such organizations, either in racial protests or abortion protests. And, surely Congress did not mean in RICO to provide damage remedies against universities that received contributions for victims of student protest, urged on by revolutionary professors.

Yet, Plaintiffs seek to ground liability for "participation" in an enterprise "through" racketeering through mere receipt of money from third parties. As the argument goes, the alleged extortion results in economic gain to the enterprise, and sustains it.

Such an argument closely resembles a desire to prevent economic success for the organizations that are tolerant of, or even sympathetic to, the cause embodied in the illegal conduct. Our Constitution must tolerate such success, and must not allow a court complaint that claiming this kind of success is barred by the Congressional efforts in RICO to prevent illegally obtained money from finding its way to lawful activity.

2. Petitioners' use of RICO to punish speech about crime even though the crime is not engaged in for profit, is itself an overbroad use of RICO.

In *Simon & Schuster v. New York Crime Victims Board*, 112 S.Ct. 501 (1991), this Court struck down a law that required escrow of the proceeds of books by criminals about their crimes. The Court's list of works that in over-inclusive fashion would be reached by such a law ranged from Rev. Jesse Jackson's writings about his arrest in 1963 for trespass in the racially segregated South to Henry Thoreau's own refusal to pay taxes, chronicled in his essay *Civil Disobedience*. *See* 112 S.Ct. at 511. In doing so, this Court acknowledged a compelling government interest in compensating victims of criminal

behavior. However, this interest did not save a law that, on its face, was not narrowly tailored because the law reached works published without regard for whether they would generate profits for the criminal. *Id.*

Similarly the construction of RICO proposed by Petitioners would hold an enterprise responsible in damages to victims of racketeering without regard for whether their protests that create fear or apprehension are also designed to generate economic gain for the participants. As with the historic works described in *Simon v. Schuster*, much written work or speech about civil disobedience from the anti-abortion perspective is written, and much speech is uttered, with no motive to profit for crime.

A fortiori, Respondents here should not be required under RICO's civil damage remedy to disgorge anything given them by third parties because they, or someone else in the media, has written about their crime.

III. The Deeply Divisive Abortion Debate Is A Particularly Bad Context In Which To Conclude That RICO Reaches Racketeering Activity Not Causing Economic Gain.

Anti-abortion activism is probably known for its certitude about the incorrectness of one of this Court's seminal decisions. This case presents a potential opportunity for adversaries of the anti-abortion movement to crush this certitude into insignificance. However, the temptation to seek to crush is just the impulse this Court is equipped to resist. Overruling the court below would affect far more that the fate of anti-abortion activity. The future of social protest movements generally, and particularly of social protest movements that oppose activities conducted for profit, are at stake. This case threatens to engulf such movements in a tidal wave of RICO litigation and thereby chill the exercise of First Amendment rights.

Political scientists have noted that:

> In the past decade, most Western democracies have experienced a flowering of citizen action

> groups and social movements concerned with environmentalism, women's rights, peace, consumerism, life-style choices, and other issues of advanced industrial societies. These groups have attempted to mobilize the public's changing values and issue interests into a new political force that can challenge governments and the dominate social paradigm. Through . . . their reliance on new forms of protest and direct citizen action, these groups have disrupted the political status quo in an effort to expand the normal boundaries of democratic politics.

The Annals of the American Academy of Political and Social Science, *Citizens, Protest, and Democracy* 8 (ed. Russell J. Dalton July 1993) (preface).

The social protest movements that come within this pattern noted by political scientists, and which are intrinsically hostile to various for-profit activities, include the animal rights movement, the anti-nuclear energy movement, and the environmental movement. Segments of the animal rights movement seek to destroy, reduce, or regulate certain economic activities, including hunting, whaling, the fur industry, the meat industry, and animal experimentation. The anti-nuclear energy movement seeks to destroy the nuclear energy industry. Segments of the environmental movement have sought to destroy or limit certain industries that claim to dispose of or process various forms of hazardous waste, apparently on the theory that the destroying of these industries would lead to a reduction in production of such wastes. The environmental movement has also been broadly hostile to other industries, such as the lumber industry in the American Northwest.

Other social movements often target economic activity as an indirect means of forcing unrelated action they seek. Gay rights boycotts of Colorado or the NOW's boycott of states failing to ratify the equal rights amendment have attempted to use the threat or reality of economic loss to affect unrelated non-economic activities. Historically, the same can be said for the boycott movement employed by civil rights activists in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

The theory of Petitioners is apparently that social-protest activities that cause an economic deprivation are actionable under RICO. As the amicus brief submitted on the behalf of the American Civil Liberties Union (ACLU) notes, this claim raises a number of First Amendment issues. The "civil liberties risks" to which the ACLU refers, however, are not eliminated by the concept that the First Amendment does not protect "illegal" conduct. As the body of this brief demonstrates, the First Amendment issues posed by this case cannot be resolved by resort to a legal/illegal distinction, because the First Amendment necessarily limits which sorts of speech, association, and expressive conduct may be made illegal.

This Court's precedents also demonstrate that a violent/nonviolent distinction, although helpful, must be further refined. *See Claiborne Hardware, supra,* and *Brandenburg v. Ohio,* 395 U.S. 444 (1969). While the First Amendment does not protect actual violent acts against persons, the First Amendment has been held to protect intimations and threats of violence in the context of overcharged political rhetoric. Thus, the Court's protection of the hate-filled rhetoric of the Ku Klux Klan, an organization clearly involved in true violence, and the Court's refusal to predicate liability based on Charles Evers bluntly threatening remarks indicate that even a "violence" standard must be understood within the context of this Court's protection of offensive, and even frightening speech. *See also, R.A.V. v. City of St. Paul,* 112 S.Ct. 2538 (1992).

The actual violence committed by anti-abortion activists, including shooting abortionists and firebombing clinics, can be and has been vigorously prosecuted by state and federal authorities. No claim has been made, or could be made, that state authorities have failed to vigorously investigate and prosecute the two recent shootings of abortionists. State law, of course, generally provides for complicity and conspiracy criminal liability. Clinic bombings, and complicity and conspiracy in relation to such bombings, is clearly actionable under 18 U.S.C. § 844(i), in combination with 18 U.S.C. §§ 2, 371. Such prosecutions, of course, would have to honor the

teaching of *Claiborne Hardware, supra*, that mere association is not equivalent to guilt. However, to the extent that national or local conspiracies involving true intent to facilitate the commission of such violent acts exists, then existing federal and state laws are adequate.

The use of RICO to punish broadly all protest activities that create an economic deprivation plainly would result in the RICO-ization of contemporary protest movements. Economic actors — ranging from logging companies to Procter & Gamble[6] — which are negatively affected by protest activities, would likely seek treble damages as a way of shutting down such protest movements. In many such instances the affected industry's profit-making activities would produce an ample litigation fund that could overwhelm the financial and legal capacities of various social protest movements. In such an atmosphere, the very threat or instigation of a suit, even without victory, could cause millions of Americans to shy away from the form of direct-democracy now represented by such movements. If this Court allows the use of RICO to destroy the anti-abortion movement, it will also threaten a host of other social protest movements

It strains belief, as well as established rules of statutory construction, to conclude that the people's representatives in Congress intended this Statute to have such possible effects on social protest movements, much less the counter-cultural abortion reform movement active in the years preceding RICO's enactment. If that is indeed the wish of the Congress, then it should be expressed directly, and not in a way that passes responsibility to this Court, as a matter of statutory construction.

---

[6] *Cf.* Julie Fields, *Animal-Rights Activists Hold Protest At Plant*, L.A. Times, Aug. 31, 1993, at B2, col. 2 (animal rights protesters demonstrated at Procter & Gamble plant, urging consumer ban on company due to company's use of animals in product testing).

CONCLUSION

These *amici* urge the Court to affirm the decision by the Seventh Circuit.

Respectfully submitted,

Steven T. McFarland
Bradley P. Jacob
Center for Law and
Religious Freedom
Christian Legal Society
4208 Evergreen Lane
Suite 222
Annandale, Virginia 22003
703-642-1070

Albert L. Jordan, Attorney for
Southern Center for Law &
Ethics, Center for Law and
Religious Freedom, and
J. Scott Houser
205-870-0555

WALLACE, JORDAN, RATLIFF,
BYERS & BRANDT
2000A SouthBridge Parkway
Suite 525
Birmingham, Alabama 35209

David Smolin
Professor of Law
Cumberland School of Law
Samford University
Birmingham, Alabama 35229

APPENDIX

APPENDIX

Statement of Interest

The Southern Center for Law & Ethics is a non-profit publicly-funded, tax exempt corporation founded in January 1985 and based in Birmingham, Alabama. Policies are set by a board of directors consisting of three attorneys and six lay persons. The Center provides legal counsel and files *amicus curiae* briefs on a variety of issues, ranging from the free speech rights of college professors to the legal status of midwives and home schoolers. The Center has been particularly active, through litigation and scholarship, in seeking to develop and promote an understanding of the constitutional right of privacy that does not include the right to abortion. *Amicus* briefs were submitted previously to this Court in three cases, and two of those briefs, submitted in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753 (1993), focused on civil disobedience in the debate over abortion.

The Christian Legal Society, founded in 1961, is a non-profit ecumenical professional association of 4,700 Christian attorneys, judges, law students and law professors with chapters in every state and at 100 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law & Religious Freedom, has advocated both in this Court and in state and federal courts throughout the nation for the protection of religious speech and exercise. The Center has filed briefs *amicus curiae* in virtually every church-state and religious expression case before this Court in the past decade.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence, 1 Stat. 1 (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of

which being religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's character, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Indeed, the Declaration states that citizens have a duty to rebel and establish anew government if this right (or any other inalienable right) is abridged by the State. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . . "

J. Scott Houser is a graduate of Westminster Theological Seminary and an ordained minister in Birmingham, Alabama. He is a well-known figure locally in public affairs. His activities, under the auspices of the Southern Center for Law & Ethics, include writing, public speaking, interaction with law students and members of the academic community, as well as counseling with practicing attorneys and engagement of lawyers as necessary on important public issues.

Houser is personally interested in this case because of pending litigation in which he is a party, and which demonstrates the potentially broad reach of RICO. The litigation began over two years after he had concluded that rescue activity was no longer appropriate. Houser's change of position is discussed in the findings of *Lucero v. Operation Rescue*, 772 F. Supp. 1193, 1197 (N.D. Ala. 1991), *aff'd*, 954 F.2d 624 (11th Cir. 1992). In July 1989, after this Court's decision in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and opportunities for valid pro-life regulatory legislation seemed available, Houser formally abandoned rescue activity. Almost two years later, the owner of an abortion facility where

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In The

Supreme Court of the United States

October Term, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Petitioners,

v.

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Brief of People for the Ethical Treatment of Animals, Inc., The PETA Gay and Lesbian Task Force, Community for Creative Nonviolence, The Fund for Animals, Inc., New England Anti-Vivisection Society, Los Angeles Earth First!, Northcoast Earth First!, Feminists for Animal Rights, Sea Shepherd Society, Fossil Fuels Policy Action Institute, Animal Law Enforcement Association, Foundation to Support Animal Protection, Inc., *Amici Curiae*, in Support of Respondents

Of Counsel:

DAVID GOLDBERGER
Ohio State University
College of Law
1659 N. High Street
Columbus, OH 43210
614-292-6821

VICTOR G. ROSENBLUM
Northwestern University
School of Law
357 East Chicago Street
Chicago, IL 60611
312-503-8443

Counsel of Record:

EDWARD MCGLYNN GAFFNEY, JR.
Valparaiso University
School of Law
656 Greenwich Street
Valparaiso, IN 46383
219-465-7833

Attorneys for Amici Curiae

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QUESTIONS PRESENTED

1. Whether the federal Racketeer Influenced and Corrupt Organizations [RICO] Act, 18 U.S.C. § 1962, should be construed broadly to apply to unlawful activity not motivated by economic objectives, including acts of civil disobedience with a revered history, so as to impair vigorous social and political advocacy.

2. Whether constitutionally protected solicitation of donations to an activist organization should be construed as evidence of an economic motivation for the organization's activities, triggering the application of RICO.

3. Whether RICO should be applied to an organization that advocates social or political change without differentiating members of such an organization who know of and authorize illegal tactics by that organization from members who are truly innocent of any illegal act.

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No. 92-780

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INTERESTS OF *AMICI*

People for the Ethical Treatment of Animals, Inc. ("PETA"), The PETA Gay and Lesbian Task Force, community for Creative Nonviolence, The Fund for Animals, Inc., New England Anti-Vivisection Society, Los Angeles Earth First!, Northcoast Earth First!, Feminists for Animal

Rights, Sea Shepherd Society, Fossil Fuels Policy Action Institute, Animal Law Enforcement Association, Foundation to Support Animal Protection, Inc., ("*Amici*") are nonprofit organizations that promote a variety of social causes. These causes can be generally described as stopping the destruction of the ecology, advocating the interests of and serving the needs of homeless people, and ending cruelty to animals. *Amici* include large, national, tax-exempt, nonprofit corporations based in Washington, D.C., New York, California, and Boston, as well as "grassroots" organizations that are less centrally based throughout the country. They represent well over one-half million members and supporters nationwide. They operate throughout the United States and abroad.

Amici advocate social and political change exclusively or primarily through lawful means. Some supporters or sympathizers of the movements that *Amici* espouse have, on occasion, committed acts of nonviolent civil disobedience in order to bring public attention to laws or practices that they find objectionable and that, they believe, the public would find similarly objectionable if the public were fully aware of them. Some of these acts could, under a very broad (unduly broad, *Amici* assert) reading of the RICO statute, constitute "predicate acts" under 18 U.S.C. § 1961(1).

Amici urge the Court that such a broad reading would constitute an unwarranted excursion into political and social advocacy and dissent not targeted by Congress when it enacted the RICO statute. It would have a strong chilling effect on activists whose nonviolent acts of civil disobedience might otherwise bring only minor sanctions, but who would rightly fear severe penalties under

RICO. Social dissent, including civil disobedience, plays such an important role in shaping our society that the judiciary should not expand RICO to apply to such activity without a clear mandate from Congress to do so.

Consequently, *Amici* urge the Court to affirm the judgment below dismissing the application of RICO to the actions of the respondents.

Amici emphasize that they take no view whatever on the issue of abortion. Some members and supporters of *Amici* strongly support broad freedom of choice for women who seek abortion, and some do not. The interests of *Amici* in this case relate solely to the legal issues raised in this appeal. This brief is filed with the consent of the parties.

SUMMARY OF ARGUMENT

Amici urge three simple propositions in this brief.

First, RICO should not be construed in a manner that would impair social and political advocacy rather than economically motivated enterprises. As the Court of Appeals held in this case, and as other courts have found through careful analysis of the RICO statute and its legislative history, Congress simply did not intend to reach social and political advocacy when it enacted RICO. Rather, in enacting RICO, Congress targeted organized crime and similar illicit, economically motivated "enterprises." Moreover, federalism dictates that courts remain wary of construing federal laws as impinging on the proper role of the States in punishing activity that offends

against the peace and dignity of their communities. Various other state and federal laws adequately address unlawful acts committed as part of social and political advocacy. Absent a clear mandate by Congress, the Court should not expand RICO into a new, draconian measure available to prosecutors and civil plaintiffs as a means of stifling social and political dissent.

Second, the solicitation or receipt of donations by an organization engaged in social and political advocacy should not be considered evidence of an economic motivation for that advocacy. Donations are related to an organization's activities, if at all, only incidentally. They are not the direct result of advocacy activities in the way economic gains are the direct product of traditional RICO crimes. Moreover, unlike enterprises clearly targeted under RICO, nonprofit organizations use their funds solely to further their programs, and may not and do not allow those funds to inure to the benefit of those who control the organizations. (This assumes, of course, that no showing of inurement or private benefit is made by a RICO plaintiff. No such showing was made in the instant case, nor could one be made with respect to *Amici*.)

Finally, RICO should not be applied to an organization that advocates radical social and political change without differentiating members of the organization who know and approve of illegal tactics from members who are innocent of those tactics.

ARGUMENT

I. The federal Racketeer Influenced Corrupt Organizations [RICO] Act should not be construed in a manner that would diminish vigorous advocacy for social and political change.

A. The need for judicial restraint in regard to expansion of RICO to other than economically motivated activities

The courts below, the respondents, and other courts have amply argued the case for judicial restraint on the expansion of RICO to other than economically motivated activities. See *National Organization for Women, Inc. v. Scheidler*, 968 F.2d 612 (7th Cir. 1992); *National Organization for Women, Inc. v. Scheidler*, 765 F.Supp. 937 (N.D.Ill. 1991); *Brief of Respondent*; *United States v. Flynn*, 852 F.2d 1045 (8th Cir. 1988); *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983). *But see, e.g., Women's Center, Inc. v. McGonagle*, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989). *Amici* generally endorse, but will not repeat, those arguments here.

This brief is intended primarily to emphasize the chilling effect that a judicial expansion of RICO beyond economically motivated crimes would have on social and political advocacy of all kinds. Unlike the assertions of the NOW Legal Defense and Education Fund ("NOW-LDF") in its Brief *Amicus Curiae*, the impact of such an expansion would not be limited to violent activity. RICO, by its very terms, applies to a broad array of nonviolent crimes. Also, as discussed below, social advocacy has not always been serene, yet there is no evidence that Congress had vigorous or even violent dissent in mind when

it enacted RICO; on the contrary, the specific target of RICO was and is abundantly clear.

A judicial expansion of RICO would cast a pall on the social and political advocacy that has historically been perhaps the most important catalyst for progress in America. Activists would never know if relatively minor infractions, committed as a part of a campaign to stimulate public awareness, could result in the heavy sanctions of RICO. Prosecutors and civil plaintiffs opposed to social change would have an awesome new weapon to stifle unpopular causes, and would likely use that weapon. The Court should be wary of unleashing such a potent force without a clear mandate from Congress.

Amici are careful to note that, in urging that limits be maintained on RICO, we and our sympathizers do not seek to evade all legal responsibility for our acts. Crimes such as trespass or disturbing the peace are punishable by fines and/or imprisonment, sanctions that many important figures in American history have been willing to bear as advocates for social progress. More serious crimes, too, are adequately addressed by other state and federal laws. *Amici* simply urge the Court that a prosecutor or civil plaintiff should not be able to invoke an additional law – one not intended to stifle social dissent – simply by arguing creatively that such activities constitute, for example, "interference with commerce" or "extortion" under RICO.

To illustrate, imagine the following hypothetical situations.

First, after repeated, unsuccessful efforts to reach a nonviolent settlement with owners of commercial whaling vessels to cease their activity, activists committed to ending the slaughter of whales deliberately interfere with the hunt by chasing whales away from the whalers and by blocking the whalers' path. The activists then publicize this event to draw public attention to the need for action in defense of whales. The owners of the vesse' sue for damages in a civil action in a federal district court with appropriate jurisdiction, and the court awards damages. If the activists decide to repeat this action or to use another form of civil disobedience to call attention to the plight of whales, should the second plaintiff be able to apply RICO to the activists or, without more, to an organization in which they are members simply because that organization espouses similar goals?

Second, imagine that activists committed to the protection of wild animals have made every reasonable effort to persuade an owner of a fur store that the sale of the skins of animals such as baby seal pups entails barbaric slaughter of these animals and that the owner should not sell garments made from such skins. Activists then protest the sale of fur by marching peacefully with signs on the public sidewalk in front of the store. Other supporters of the protest enter the fur store and surreptitiously place anti-fur messages in the pockets of garments in the store. As in the prior hypothetical, the owners of the store sue for damages in a civil action in a federal district court with appropriate jurisdiction, and the court awards damages. If the activists decide to repeat this action or use another form of civil disobedience to call attention to the

plight of seal pups, should the second plaintiff be able to apply RICO to the activists?

Third, imagine that activists opposed to vivisection have learned of a research center that is engaged in needless destruction of animals for no apparent scientific good, and that there is a complete failure to reach an accord with the research center at least to eliminate the projects that result in the needless destruction of animals. Activists then enter the research center without permission and conduct a sit-in to draw public attention to the experiments, which they denounce in a news release as "needless, wasteful, and cruel." As in the prior hypothetical, the owners of the research center sue for damages in a civil action in a federal district court with appropriate jurisdiction, and the court awards damages. If the activists decide to repeat this action or use another form of civil disobedience, should the second plaintiff be able to apply RICO to the activists?

Under the theory of the petitioners, the answer to each of these three questions must be in the affirmative. The repetition of acts that are not constitutionally protected suffices in the theory of the petitioners to count as the predicate act of "extortion" under RICO, and to subject any activist social protest movement – and its members – to the sanctions of the Act, including stiff criminal sentences for a federal felony conviction, the potential loss of the franchise that is entailed in a felony conviction, treble damages, and forfeiture of any property that might have been used in the protest activities deemed an act of "extortion" under the Hobbs Act, 18 U.S.C. § 1951.

B. Concerns of Federalism

The theory of the petitioners is too clever by half. The half they forgot about is the role of the States in punishing activity that offends against the peace and dignity of their communities. *Amici* do not urge that activists who engage in law violation should be free of any sanction for their behavior. On the contrary, we acknowledge that, under applicable State law, both civil and criminal consequences may flow from this kind of activity. On the other hand, the petitioners apparently want the federal judiciary to become the normal forum for disposing – at very high stakes – of their ideological opponents.

People like the respondents – and they are by no means limited to right-to-life advocates – have been willing to risk the occasional violation of the law through civil disobedience in part because the realistic consequences were appropriate to the offense. For example, the defendants might receive appropriate fines and sentences that are tailored to the particular circumstances of the offense. RICO would replace appropriate sanctions for civil disobedience with disproportionate sanctions designed for reviled and truly dangerous criminal activity of organized crime. If the theory of the petitioners is correct, moreover, federal judges applying the criminal provisions of RICO to civil disobedience will have little or no discretion under the new federal sentencing guidelines to take into account the grounding of any particular defendant's behavior in a sincerely held conscientious conviction that the law in its current state must be disobeyed. In short, the petitioners seek to "up the ante" for

behavior that witnesses against their convictions, perhaps with the hope that it will thereby be diminished or go away.

The petitioners do not seek to eliminate State jurisdiction over crime altogether. They presumably would allow a State to treat as a local tort or crime, subject to garden variety civil and criminal sanctions, an act of trespass by a neighbor who crosses a property line solely for self-serving personal gain or who is at best inattentive to the well being of the community. If, however, acts of trespass on private property are grounded in social and political ends that are not popular, then – in the view of the petitioners and their *Amici* – then the heavy arm of the federal anti-racketeering statute should be used to sanction acts of trespass.

This is not a very healthy view of "Our Federalism." In *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, this Court has repeatedly taught that the federal courts should normally stay their hand to allow the State courts to exercise appropriate jurisdiction over matters of concern to the several States. The effect of accepting the petitioners' theory would be to expand exponentially the jurisdiction of federal courts over matters that traditionally have been thought to be well within the province of State and local law.

In addition, the damage to the vitality of vigorous protest movements – an important *federal* interest that *Amici* must assert here because the United States has

declined to do so in its amicus brief[1] – entailed in the petitioners' theory seems clear. In the view of the petitioners, trespass or damage to property should be dramatically escalated if it is meant to convey a message with which the petitioners disagree. Unless the court of appeals is affirmed, it will become open season for the ideological adversaries of animal rights advocates and environmentalists who engage in acts remarkably similar to those of the respondents in this case.

There is and there ought to be a lot of room in the law between activity that is unqualifiedly protected under the First Amendment and activity that is severely punished under a federal statute in which Congress took aim at organized crime. The reach of RICO is now clearly well beyond groups like "the Mafia," but that does not mean that this Court is powerless to articulate principled limits on the use of the federal government to wreak vengeance against ideological adversaries on the burning political issues of the day. For this reason, *Amici* urge this Court to act with caution when the federal courts are called upon to approve a radical extension of RICO to

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[1] Attorney General Reno addressed the annual meeting of the American Law Institute last May, flagging as problematic the increasing tendency of the federal government to increase its jurisdiction over matters that previously had been thought to be the concern of State law. Far from acknowledging the gravity of this problem, the brief filed by the Solicitor General in this case marches in the opposite direction, seeking to expand federal prosecution of garden variety State crimes without a clear statement of congressional intent to upset the traditional balance between the federal government and the States. *See New York v. United States*, 112 S.Ct 2408, 2425 (1992); *United States v. Bass*, 404 U.S. 336, 349 (1971).

activity that is already punishable under applicable statutes of the several States, and a radical expansion of RICO that is not demonstrably clear either in the text of the statute or its surrounding history.

Even if Congress were to amend RICO expressly to confer jurisdiction upon federal courts over conduct such as that complained of here, there would still be issues of constitutional limits on such an Act if it were to chill protected expression or activity. But this case does not require the Court to strike down an Act of Congress for the simple reason that it does not now have such a statute before it. All that is necessary is that the Court decline to accept petitioners' invitation to read the statute as expansively as they would like the Court to do. Petitioners, of course, have already reverted to the political branches to attempt to obtain the revolutionary transformation of responsibility for the prosecution of local crimes that they evidently desire. *See* S. 636, "Freedom of Access to Clinic Entrances Act of 1993"; H.R. 796, "Freedom of Access to Reproductive Services Act of 1993," 103d Cong., 1st Sess. (1993). For that very reason they should not expect this Court to adopt their fanciful and dangerously expansive theory of RICO.

The causes that *Amici* support are sometimes unpopular with establishment forces. Thus there are very practical reasons for judicial concern about the protection of the rights of vulnerable minorities to engage in meaningful protest, especially when it is aimed at current governmental policy. *Gentile v. State Bar of Nevada*, 501 U.S. ___, 111 S.Ct. 2720, 2724 (1992) ("speech critical of the exercise of the State's power lies at the very center of the First Amendment").

C. The Importance of Social Protest in America

This nation is renowned for its contribution to the rule of law. Embodying this spirit is the epigram of Robert Hale inscribed on the Department of Justice: "We are a government of laws, not of men." This truth is not contradicted, but is reinforced by the apparently paradoxical fact that the law has developed in this country in part because of those who have had the courage to disobey it. As Justice Marshall reminded us during the Bicentennial of our Constitution, not everything about this country's past – including slavery and the exclusion of women from participation in the democracy – is cause for rejoicing. Thurgood Marshall, Reflections on the Bicentennial of the United States Constitution, 26 *Valparaiso U. L. Rev.* 21 (1991).

Because this is so, we are a people with both a strong respect for the civilizing force of law and a healthy regard for the moral limits on law itself acknowledged in the tradition of civil disobedience, including episodes of confrontation with authority, that can be found in virtually every period of American history. *See, e.g., Civil Disobedience in America: A Documentary History* (David Weber ed. 1978); Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law* (1971); and Edward Madden, *Civil Disobedience and Moral Law in Nineteenth-Century American Philosophy* (1968). NOW-LDF would have the Court believe that expansion of RICO to other than economically motivated crimes would not hinder social dissent. They argue that RICO would reach only violent crime and so could not be used to hinder the progressive movements to which they refer in their brief. But, again, RICO

applies to many nonviolent crimes by its express terms. Moreover, social advocacy has not always been so serene as NOW-LDF makes out and, under the theory advanced in their brief, many of the social movements described by NOW-LDF would have been halted by RICO. We see no support for any contention that Congress intended that result in enacting RICO. No matter what view this Court adopts with respect to the reading of RICO that the Court of Appeals espoused in this case, *Amici* urge this Court not to rely upon the bland reading of American history offered to it in the NOW-LDF Amicus Brief, at 18-25.

As we show below, much of the violence surrounding civil disobedience was visited upon, not by, the protesters. But we do not maintain that American protesters in the past did nothing but sit down to tea with their adversaries. Indeed, from the famous "tea party" in Boston on December 16, 1773, protesting in an angry, violent manner the British tax on tea after the repeal of the Townshend Acts, to the massive demonstrations against the Vietnam War two centuries later, our history has been unmistakably marked with protest movements that have involved clashes with authority and intentional violations of the law. At the time of the protests, very few found the behavior of these dissidents comfortable, palatable, or even tolerable. Dissidents have, accordingly, suffered the imposition of fines and other criminal sanctions for the courage of their convictions.

In recent times we frequently compared ourselves favorably to totalitarian regimes of the Left and the Right that swallowed up their opposition, sending them to the death camps and the Gulags for extermination. We take some pride in the way we have tolerated the strong voice

of protest within our legal and political culture. Perhaps we have taken too much pride in our treatment of dissidents in view of the harsh penalties that were frequently applied to them. Whatever the right blend of pride and humility about our past, it is undeniable that our dissidents have at many critical turning points of American history helped to shape our destiny. But it has been a lot easier to recognize the value of radical protest decades afterwards, when the position the protesters espoused was more broadly received by the people and incorporated into our laws.

A classic illustration of this point is the eradication of the slavery system, which nearly everyone in America would now regard as the just and rightful repudiation of a brutal and inhuman labor system. Some might claim that slavery might have been abolished earlier and with less bloodshed on the battlefields of the Civil War if the Abolitionists had been more "accommodating" to their adversaries, but this revisionist view overlooks the hard mindset of the slaveholders who would brook no compromise on the matter of slavery as an inalienable property right.

Whatever the possible outcome of alternative hypothetical scenarios, the fact remains that the Abolitionists were indeed radical in their day. The most famous of the Abolitionists, William Lloyd Garrison, was uncompromising in his campaign for immediate and complete abolition of slavery. In the first issue of *The Liberator* (Jan. 1, 1831) Garrison publicly renounced his previous position of gradual abolition and publicly asked "pardon of my God, of my country, and of my brethren, the poor slaves, for having uttered a [gradualist] sentiment so full of timidity,

injustice and absurdity." And he wrote: "urge me not to use moderation in a cause like the present! I am in earnest. I will not equivocate – I will not excuse – I will not retreat a single inch – AND I WILL BE HEARD." As cited in *The Abolitionists: A Collection of Their Writings* 31 (Louis Ruchames ed. 1963) (emphasis in original).

By and large Garrison preferred moral persuasion over violence, but it cannot be maintained that he was a total pacifist. Thus, after John Brown's raid at Harper's Ferry in 1859, Garrison noted that "no one who gloried in the legends of the Revolution could deny the right of slaves to revolt," and suggested that a "harvest of retribution" against the slaveowner was imminent since he had "forfeited his right to live." Lewis Perry, *Radical Abolitionism: Anarchy and the Government of God in Anti-slavery Thought* 259 (1973); *and see* Gerald Sorin, *Abolitionism: A New Perspective* 77-98 (1972).

It can plausibly be maintained that less famous Abolitionists were more effective in moving the hearts of their countrymen, but Garrison and the radical Abolitionists were ultimately heard indeed. As Garrison put it in the opening issue of *The Liberator*, "POSTERITY WILL BEAR TESTIMONY THAT I WAS RIGHT." As cited in *The Abolitionists: A Collection of Their Writings* 31 (Louis Ruchames ed. 1963) (emphasis in original). Although not all of the acts of the Abolitionists would gain support even today, the basic thrust of their movement has now clearly prevailed in American law. Decades after the failure of the problematic period of "Reconstruction" – itself

a dramatically violent period[2] – we are now more committed than ever to the enforcement of the Civil War Amendments that would have been inconceivable without the firm resolve of the "Radical Republicans" and their moral progenitors, the Abolitionists.

The NOW-LDF brief would have this Court imagine that the period from the adoption of the Civil War amendments in the late nineteenth century to the adoption of legal protection for women and minorities, has been a calm and serene passage, free from violence. In the revisionist version of history offered in this brief, these *Amici* would have the Court believe that nonviolence reigned supreme in all of the four protest movements explored in this brief. Brief Amicus Curiae of the NOW-LDF (exploring the Abolitionist Movement, at 19-20, the Woman's Suffrage Movement, at 20-21, the Civil Rights Movement, at 22-23, and the Gay Rights Movement, at 23-25).

The halcyon perspective in the NOW-LDF brief is wishful remembering of the past, artfully dodging the tragic reality of all four of these periods of American history. We discuss each of these periods briefly. We do so not to endorse violence, and much less so to suggest that it ought not to have any legal consequences. On the contrary, we do not wish to suggest that any of the *Amici* – or the respondents, for that matter – are committed to anything but nonviolent protest. But we simply suggest

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[2] *See, e.g.*, Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (1988); Hans Trefousse, *The Radical Republicans: Lincoln's Vanguard for Racial Justice* (1969); and Kenneth Stampp, *The Era of Reconstruction, 1865-1877* (1965).

that the line between violence and nonviolence is not always easily drawn, for the characterization of an act as violent or nonviolent depends sometimes on the collective consciousness of whose violence is being recalled, and from what perspective the acts are viewed. For example, Bull Connors undoubtedly thought he was preserving the peace against lawless agitators in Birmingham, but most of us saw the violence in the bared teeth of his dogs. Our point is that Congress did not intend to draw such lines or to stifle any type of social dissent when it enacted RICO.

First, we have already discussed the Abolitionists above. We now add that the American Anti-Slavery Society, of which Garrison was President from 1843 to 1865, regularly burned a copy of the Constitution at its annual meeting in Boston, denouncing that document – because of its flawed compromise on slavery – as "a compact with death, a covenant with hell" (citing *Isaiah* 28:15); *see* Edward McGlynn Gaffney, Politics Without Brackets on Religious Convictions, 64 *Tulane L. Rev.* 1143, 1165 (1990).

Under modern precedents that sort of activity would certainly be deemed protected. *See Texas v. Johnson*, 491 U.S. 397 (1989) (burning of American flag protected); *but see United States v. O'Brien*, 391 U.S. 367 (1968) (burning of draft card not protected). So would many of the incendiary speeches that the Abolitionists delivered, even though devastating violence ensued in places like "bleeding Kansas."[3] *See Brandenburg v. Ohio*, 395 U.S. 444 (1969)

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[3] For an account of the bloody conflict in the Kansas Territory over slavery in the 1850's, *see* David Potter, *The Impending*

(per curiam). But under the law as it then stood, these acts were not protected under the First Amendment. The acts in question included the unlawful operation of the "Underground Railroad" to assist slaves to flee from their masters, *see* Gaffney, Politics Without Brackets on Religious Convictions, 64 *Tulane L. Rev.* 1143, 1160, and the "rescuing" of slaves from the very courtrooms where their extradition hearings under the Fugitive Slave Act were being held, *see* Aviam Soifer, Status, Contract, and Promises Unkept, 96 *Yale L. J.* 1916, 1919 (1987), and Stephen Campbell, *The Slave Catchers: Enforcement of the Fugitive Slave Law, 1850-1860* 149 (1968). One consequence for these acts is that the Abolitionists suffered violence for their views not only at the hands of private parties, but also at the hands of the government.

Second, the feminists of the nineteenth century were by no means confined to the rosy-tinted picture painted in the NOW-LDF Brief. Susan B. Anthony is dealt with as an advocate for the enfranchisement of women, which she certainly was. No mention is made of her role as an agent of the American Anti-Slavery Society, in which capacity she urged an audience before the Civil War to "overthrow this government, commit its blood-stained Constitution to the flames, blot out every vestige of that guilty bargain of the father." As cited in Alma Luz, "Susan Brownell Anthony," in 1 *Notable American Women, 1607-1950: A Biographical Dictionary* 53 (Edward James ed. 1971).

Crisis, 1848-1861 199-224 (1976), and Louis Filler, *The Crusade Against Slavery, 1830-1860* 218-257 (1960).

Even in the voting area, the NOW-LDF Brief appears not to be blind to the similarities between the facts they narrate and the typical acts of protest engaged in by the respondents. Indeed, this similarity is borne out in the details of the very case they cite relating to the criminal conviction of Susan B. Anthony for voting in Rochester in 1872 before a constitutional amendment expressly allowed it. *United States v. Anthony*, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873). The transcript of Anthony's bold statement before her sentencing makes clear that she was prepared to risk not only violating the law as it then stood, but also being found in contempt of court. Anthony continued to speak powerfully about the injustice of her conviction after Judge Hunt warned her seven times to the effect that "The Court can not allow the prisoner to go on." After she finally sat down, the Court required her to stand up to hear her sentence, and she then told the Court: "May it please your honor, I shall never pay a dollar of your unjust penalty. . . . I shall earnestly and persistently continue to urge all women to the practical recognition of the old revolutionary maxim, that 'Resistance to tyranny is obedience to God.' " *Civil Disobedience in America: A Documentary History* 185-188 (David Weber ed. 1978).

Anthony was ultimately vindicated by the enactment of the Nineteenth Amendment, which was ratified in 1920, but only after several further bold acts of public protest unmasking the "hypocrisy" of President Woodrow Wilson's commitment to democracy for males in Europe, but not for females in America. As with the Abolitionists, so also the Suffragists suffered violence at

the hands of the federal troops dispatched by President Wilson to break up their rallies.

In focusing exclusively on the drive for women's franchise, the NOW-LDF brief omits any consideration of one of the most significant women's movements in this period, the drive for temperance, in which women played a leading, female-dominant role. Perhaps the omission is not due to ignorance, but to the similarity between the acts of the respondents complained of here and the militant tactics employed by famous nineteenth century feminists who led the temperance movement. For example, Carry Nation and others like her applied constant moral pressure on owners of saloons to discontinue their sale of alcohol, and were willing to disrupt their business by charging into saloons and destroying kegs of whiskey and beer with an ax. *See, e.g.*, Jack Clocker, *"Give to the Winds Thy Fears": The Women's Temperance Crusade, 1873-1874* 50, 76-77, 197 (1985) (describing violence by and against protesters); Joseph Gasfield, *Symbolic Crusade: Status Politics & the American Temperance Movement* (2d ed. 1986); Mother Stewart, *Memories of the Crusade, A Thrilling Account of the Great Uprising of the Women of Ohio in 1873, Against the Liquor Crime* (1972); *National Organization for Women v. Scheidler*, 968 F. 2d 612, 620 (7th Cir. 1992) (discussing role of women in Temperance Crusade).

Third, the Civil Rights Movement is depicted in the NOW-LDF brief as though everything were sweetly nonviolent. The recent attention to alternative leaders like Malcolm X should have made such a skewed account untenable. But the most remarkable part of the law-office history narrated in the NOW-LDF brief is that the very source it relies on, Taylor Branch's masterful account of

the "King years" in the civil rights movement, *Parting the Waters* (1988) is itself a rich source for the use of tactics of civil disobedience similar to those used by the respondents in this case.

Perhaps the most memorable recent use of civil disobedience to change the law was the efforts of the freedom riders and the people who "sat in" places of public accommodation that before the enactment of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, were segregated on the basis of race. In some cases this Court overturned convictions for breach of the peace or for trespass under State law, perhaps for the reason that the Court could no longer countenance the underlying State legislation requiring Jim Crow segregation, *see, e.g., Brown v. Louisiana*, 383 U.S. 131 (1966).[4] In other instances the Court declined to reverse criminal convictions of protestors under State law, pointing to other dimensions of the facts, such as the integrity of the State courthouse or a State jailhouse. *See, e.g., Cox v. Louisiana*, 379 U.S. 559 (1965); *Adderley v. Florida*, 385 U.S. 39 (1966). No matter which way these cases turned, the inescapable fact is that civil rights activists engaged in acts of civil disobedience remarkably similar to some of the acts of the respondents which the petitioners would now like to transform into federal felonies. No one would seriously maintain that Martin Luther King, Jr., or his colleagues in the Civil

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[4] In a series of "sit-in" cases brought before the enactment of Title II of the Civil Rights Act of 1964, the Court declined to hold expressly that the Jim Crow laws were themselves unconstitutional, but found an alternative ground on which to reverse the State law conviction. *See, e.g., Bouie v. Columbia*, 378 U.S. 347 (1964); *Bell v. Maryland*, 378 U.S. 226 (1964).

Rights movement, were the sort of "racketeer" that Congress had in mind when it enacted RICO.

Fourth, the sanitized version of the Gay Rights Movement offered in the NOW-LDF Brief omits any account of aggressive acts of trespass by the AIDS Coalition To Unleash Power ("ACT UP"), an AIDS advocacy organization that has occasionally resorted to conduct as disruptive as those of the respondents. For example, ACT UP members disrupted religious services by passing out condoms at St. Patrick's Cathedral in New York while Cardinal John O'Connor was distributing the bread of the Eucharist to communicants at a Sunday Mass. *See* Jason DeParle, 111 Held in St. Patrick's AIDS Protest, *New York Times*, Dec. 11, 1989, Sec. B, p. 3, Col. 4; and Editorial, The Storming of St. Pat's, *New York Times*, Dec. 12, 1989, sec. A, p. 24, col. 1 (criticizing demonstrators for turning "honorable dissent into dishonorable disruption"). Church authorities surely have some interest in the peace and security of their houses of worship. Even so, that does not mean that dissidents who disrupt religious services should be sueable under RICO, for State law suffices to redress the situation.

Even if it were true that right-to-life groups employ tactics unique to them when they violate the law – it plainly is not – , the danger of applying RICO to the respondents here is that there is no principled basis for limiting its application to other groups engaged in social and political protest, without unconstitutionally discriminating on the basis of the viewpoint of the protesters' message. *See, e.g., Chicago Police Dept. v. Mosley*, 408 U.S. 92 (1972).

The spirit of protest against the law has moved beyond the civil rights movement to many other movements of social protest. For example, environmentalists opposed to the harvesting of certain trees have chained themselves to logging equipment to prevent its use. *See, e.g., Huffman and Wright Logging Co. v. Wade*, 62 U.S.L.W. 2148 (Ore.S.Ct., Aug. 19, 1993) (affirming imposition of punitive damages against protestors who caused suspension of logging operations for most of one day).

Activists opposed to the possession and implied use of nuclear weapons have frequently engaged in trespass on federal property where such weapons are stored. For example, they have on occasion entered the Pentagon building and used religious imagery, pouring out blood to symbolize the shedding of blood in war, and sprinkling ashes to symbolize repentance for the taking of human life. *See, e.g., United States v. Cassidy*, 616 F. 2d 101 (4th Cir. 1979). Sometimes the target of the anti-nuclear war protesters has been a particular weapons delivery system, such as a B-52 bomber, which they damaged with a hammer to prevent its immediate use, *United States v. Allen*, 760 F. 2d 447 (2d Cir. 1985), or a Trident nuclear submarine, to which the defendants attached posters "indicting" General Dynamics and the United States for their participation in the manufacture of nuclear missiles, and on which they spray-painted the biblical injunction "Thou shalt not kill" (*Exodus* 20:13; *Deuteronomy* 5:17) after unlawfully entering the premises of the defense contractor, *State v. Champa*, 494 A. 2d 102 (R.I. 1985).

Over the past two decades persons opposed to the production and use of nuclear energy have not only stated their concerns about radioactive waste to Congress

and the relevant regulatory agencies. From New Hampshire to California they have also put their bodies on the line, chaining themselves to the entrance of nuclear power stations to inhibit access by workers to the facilities.

The point is not whether or not the lower courts have found this conduct protected under the Constitution, but simply that a variety of social protest movements have engaged in activity of this sort and that their conduct – if found unlawful – can and has been adequately proscribed under state and federal laws without invoking RICO. To use the federal racketeering laws against such protesters would send not a "big chill," but a sub-zero blast into all sorts of groups that have traditionally resorted to civil disobedience as a dramatic means of calling to public attention the infirmities of the law itself.

One of the petitioners' amici expressly targets some of the *Amici* – animal rights organizations – who have joined in this brief. Brief Amicus Curiae of the American Medical Association and American College of Obstetricians and Gynecologists, at 4, 22-23. The AMA-ACOG brief cites no cases linking any animal rights organization with the recent murder of health care workers, for the simple reason that there are none. Nonetheless, it impliedly holds these groups responsible for these tragic deaths. And it characterizes these groups as engaged in "medical vigilantism" and "political terrorism."[5] If the

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[5] After the recent signing of a Statement of Principles, the State of Israel has higher regard for the PLO than the AMA and the ACOG have for their ideological opponents. Rather than branding the PLO as "political terrorists," Israel now seems

reckless and highly inflammatory way in which the AMA-ACOG Brief has rushed to judgment against groups organized for the ethical treatment of animals is any indication of things to come, the federal judiciary will be very busy entertaining ideological controversies better fought out in the political branches.

II. Constitutionally protected solicitation of monetary donations to an activist organization should not be construed as evidence of an economic motivation for the organization's activities, triggering the application of RICO.

In their opening brief, the petitioners argue that they should not be held to demonstrate that an "enterprise" attacked under civil RICO has an economic motive. They concede for the sake of argument that plaintiffs in a RICO action should be required to demonstrate that parties sued under this statute have an economic motive for the conduct for which they are being sued. But then they suggest at 14, 45-48 that they should have survived a 12(b)(6) motion here because the respondents have profited from the conduct of which the petitioners complained. The economic benefit or "profit" to which the petitioners refer turns out to be routine organizational expenditures deriving from the free-will offerings or donations that people make to entities such as Operation Rescue.

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willing to recognize their former adversaries in a formal way and to pursue the prospect of peace with them. There may be a parable there.

This argument, if it can be called that, proves too little and too much. Too little, because petitioners have made no showing here of a nexus between the contributions to the petitioners and the sort of conduct of which the respondents complain. They merely assert that if a charitable organization solicits donations and spends them, they have met any "economic benefit" test that should be applied under RICO. But there is no necessary causal connection between the contributions of members of such an organization and the specific projects that the organization undertakes. Many contributors give to organizations because they are generally in sympathy with its ends, without analyzing each and every undertaking of the organizations to which they contribute. And donations are, at most, incidentally related to organizational activities, not the direct result of those activities in the way that economic gains are the direct product of traditional RICO crimes.

Amici challenge the notion advanced by the petitioners that a properly managed exempt organization could ever have illegal economic motivation within the meaning of RICO. RICO was clearly aimed at the grossly illegal accumulation of wealth from organized criminal activity. Under I.R.C. § 501(c)(3) and parallel State laws governing nonprofit organizations, however, these exempt organizations may not allow any of their assets to inure to the private benefit of those who control these organizations. Absent a showing that nonprofit managers have attempted to fleece an organization – one not made here by the petitioners and one that cannot be made with respect to any of the *Amici* – no economic motivation should be found. Although it is conceivable that an

exempt organization might be a subterfuge for illegal activity and private gain, remedies for this contingency already exist under federal and State law. Accordingly, there is no need to expand RICO on the basis of the slender reed on which the petitioners rest their claim.

On the flip side of the coin, petitioners' "economic motivation" argument proves too much because *all* voluntary associations, including the National Organization for Women, receive such contributions to support their activities. If they do not, they wither and die. Indeed, such contributions are constitutionally protected. *Buckley v. Valeo*, 424 U.S. 1 (1976). Among other reasons, that is why this Court has been solicitous to protect organizations as diverse as NOW and Operation Rescue from excessive regulation of their charitable solicitation by the several States. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

III. RICO should not be applied to an organization that advocates social or political change without differentiating members of such an organization who know of and authorize illegal tactics by that organization from members who are truly innocent of any illegal act.

Finally, *Amici* wish to focus briefly on the teaching of this Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). That case sets clear limits on the imposition of vicarious or enterprise liability to an entire group for the conduct of some members who might have known of and authorized illegal tactics by that organization, while most of the membership remained truly innocent of any illegal

acts committed by the organization. The *Claiborne Hardware* case is well briefed and argued in the Brief Amicus Curiae submitted by the ACLU on behalf of neither the petitioners nor the respondents. For that reason we do not add many more words on the subject here.

We do wish to emphasize, however, that we are led to a different conclusion from the "plague on both your houses" approach of the ACLU. For us, *Claiborne Hardware* and the other associational freedom cases, *see, e.g., NAACP v. Button*, 371 U.S. 415 (1963), and *NAACP v. Alabama*, 357 U.S. 449 (1958) teach clearly that "it is proper to take alarm at the first experiment on our liberties," James Madison, *Memorial and Remonstrance*, cited in *Everson v. Board of Educ.*, 330 U.S. 1, 65 (1947), not when the last nail is being placed into the coffin. There must be more to the law than the simplistic and stark choice that the petitioners urge here, between fully protected conduct on the one hand or a federal felony offense with severe penalties under RICO on the other. It is hard enough for civil libertarians to sustain a coherent and vigorous defense of the voice of protest in this society, without adding the devastating effect of RICO to diminish or still that voice. If Congress really means to do that to the struggle for the soul of America, let Congress do it, and not this Court.

CONCLUSION

For the reasons set forth in this brief, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

Of Counsel:

DAVID GOLDBERGER
Ohio State University
College of Law
1659 N. High Street
Columbus, OH 43210
614-292-6821

Counsel of Record:

EDWARD MCGLYNN GAFFNEY, JR.
Valparaiso University
School of Law
656 Greenwich Street
Valparaiso, IN 46383
219-465-7833

VICTOR G. ROSENBLUM
Northwestern University
School of Law
357 East Chicago Street
Chicago, IL 60611
312-503-8443

Attorneys for Amici Curiae

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